

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

MISSOURI RETAILERS ASSOCIATION,)
GEORGE KAISER D/B/A KAISER)
GRAND MART AND YOUSSEF ISSAWI)
D/B/A EXPRESS LANE MARKET,) Case No.
----- Plaintiffs,) 4:98CV01514 ERW

vs.)

CITY OF ST. LOUIS,)
----- Defendant.)

HEARING ON PRELIMINARY AND PERMANENT INJUNCTION
BEFORE THE HONORABLE E. RICHARD WEBBER
UNITED STATES DISTRICT JUDGE

OCTOBER 8, 1998, 8:50 A.M.

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1 THE COURT: Missouri Retailers Association,
2 George Kaiser and others versus City of St. Louis. The
3 number is 4:98CV1514. Plaintiff ready, Mr. Kohn?
4 MR. KOHN: The plaintiffs are ready, Your Honor.
5 THE COURT: Defendants ready, Mr. Banks?
6 MR. BANKS: Defendants are ready, Your Honor.
7 THE COURT: You may proceed, Mr. Kohn.
8 MR. KOHN: Thank you, Your Honor. May it please
9 the Court, I'd like to make a five- or six-minute opening
10 statement.
11 THE COURT: That would be helpful.
12 MR. KOHN: I know Your Honor has our brief which
13 we filed with the Court yesterday and --
14 THE COURT: I have received it and have read it.
15 MR. KOHN: And Mr. Banks also has a copy and I
16 think that will enable me to be very, very brief because I
17 think our position is set forth in our brief.
18 I represent two plaintiffs. One is the Missouri
19 Retailers Association, which was created pursuant to an
20 order and decree of the Circuit Court of the City of
21 St. Louis on October 23, 1933. It was formed by a group of
22 St. Louis businessmen, and eventually, while it started out
23 in St. Louis, it has moved its office to Jefferson City.
24 The Association represents interests of retailers in the
25 state of Missouri, including retailers of tobacco products

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1 in the City of St. Louis who display advertising and
2 promotional materials for tobacco products.
3 I also represent George Kaiser. Mr. Kaiser is an
4 individual who operates a convenience store, serve yourself
5 gas, and car wash, and he does his business under the name
6 of Kaiser Grand Mart, which is located at 5000 South Grand
7 Avenue in St. Louis, on the south side. His store is
8 located within 2,000 feet of St. Mary's High School and the
9 St. Joseph Home for Boys. He sells cigarettes and other
10 tobacco products at the Mart, and the cigarettes that he
11 sells carry the warnings required by the Surgeon General
12 pursuant to the Federal Cigarette Labeling and Advertising
13 Act.
14 My plaintiffs, Your Honor, are here to challenge
15 an ordinance, 6444 -- 64463, enacted by the City of
16 St. Louis on July 24, 1998. And that ordinance bans the
17 advocacy or promotion of signs which advertise the use of
18 cigarettes or tobacco products within 2,000 feet of a public
19 park, day-care facility, community recreation center, or
20 public or private school through grades 12.
21 Very simply, Your Honor, we believe and we think
22 the evidence will show that the ordinance is both illegal

23 and unconstitutional. First of all, it is illegal because
24 Congress has passed a law, the Federal Cigarette Labeling
25 and Advertising Act, which has preempted the field and which

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1 regulates tobacco advertising, and it specifically provides
2 that the cities or states or counties may not impose a ban
3 on advertising cigarettes if the cigarettes are properly
4 labeled under federal law. It's a preemption statute.
5 Congress has entered the field related to cigarette
6 advertising and, pursuant to 1334(b), the specific
7 preemption statute -- statutory provision in the Act, cities
8 are preempted from also entering the field.

9 The evidence will show that this ordinance bars
10 advertising signs for cigarettes and I think, as a matter of
11 law and fact, the reason for this ban is health-related.
12 The ordinance is intended to protect minors and out of a
13 concern for minors, a concern which my clients share, but
14 under the preemption statutes and the cases we've cited in
15 our brief, Your Honor, the ordinance is void. The supremacy
16 clause of the United States Constitution makes laws of the
17 United States the supreme law of the land and ordinances to
18 the contrary are invalid.

19 We also say, Your Honor, that the ordinance is
20 unconstitutional under the First Amendment, the free speech
21 amendment, and we say that for two separate reasons. First,
22 it prohibits signs which advocate smoking. It does not
23 prohibit signs which advocate not smoking. It is therefore
24 clearly point-of-view legislation which strikes a dagger in
25 the heart of the First Amendment. The founders said, Your

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1 Honor, "We may disagree with what you say, but we shall
2 defend to the death your right to say it." That's the heart
3 of the First Amendment, and this ordinance does not give
4 those who sell cigarettes the right to advertise them, and
5 it is content-oriented and it is unconstitutional.

6 The courts, and we've cited them in our brief, the
7 courts give strict scrutiny to laws which infringe on the
8 right of speech as distinguished from laws which prohibit
9 certain kinds of conduct. This is not a conduct ordinance.
10 This is a speech ordinance. And of course the First
11 Amendment is applicable to the states through the Fourteenth
12 Amendment and of course the Missouri Constitution has a
13 similar provision.

14 Now, even if this -- secondly, even if this
15 ordinance were limited only to commercial speech, a ban on
16 advertisements, as distinguished from a ban on advocacy,
17 which it is, but even if it were limited to a ban on
18 advertising, under commercial speech cases, commercial
19 speech is also protected under the First Amendment, and it's
20 protected if the advertising prohibition does not directly
21 advance a governmental interest.

22 The defendant will say and will produce evidence
23 that it believes shows that advertising advances a
24 governmental interest in health, but our evidence, Your
25 Honor, is going to show that advertising does not affect

8

1 persons initiating smoking. It does not affect
2 consumption. What advertising does in a mature product,
3 such as automobiles or soap or colas, it reenforces people's
4 loyalty to a particular brand or it causes them to shift
5 brands. It does not cause people to initiate smoking, to
6 initiate using smoke -- using soap, or to initiate drinking
7 cola as opposed to, let's say, milk.

8 The second prong of the commercial speech rules
9 that have to be met, and if they aren't the statute or
10 ordinance is unconstitutional, the courts looked very
11 carefully at whether an ordinance is more -- is more
12 extensive, more expansive than necessary. Now, if the goal
13 is to prevent teenage smoking, a goal which we commend,
14 there are things that ought to be done rather than impinging
15 on free speech. First of all, the ordinance on the books
16 should be enforced more rigorously if the City feels it
17 isn't being enforced rigorously enough. It's interesting,
18 Your Honor, to point out that the ordinance that was passed
19 that is challenged here today not only has a penalty of a
20 fine, it has a penalty of imprisonment for 90 days for each
21 day of violation, and what's interesting about that, Your
22 Honor, is that the ordinance that's on the books that bans
23 or prohibits people from selling cigarettes to minors,
24 conduct if you will, that conduct is punishable by a fine
25 and not by imprisonment. So this ordinance is more

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1 expansive than necessary.

2 What they should do if they want to help, and they
3 do, is to pass an ordinance that makes selling cigarettes to
4 minors punishable by a sentence of 90 days, like this
5 ordinance does. They could make it illegal for minors to
6 possess cigarettes. They don't do that. They could make it
7 an offense, if a minor is in possession of cigarettes, to
8 take away the minor's driver's license. They could have an
9 ordinance that licenses people who sell cigarettes and then
10 if someone sells cigarettes to minors, they can take away
11 that license, and indeed they could use the money that
12 the -- the license fees that they collect, they could use
13 that money to advertise, to educate the community not to
14 smoke.

15 In a way, this ordinance is really directed at
16 adults and not at minors. I say that for a couple of
17 reasons, Your Honor. First of all, minors are already
18 prohibited from buying cigarettes. The only people who can
19 buy cigarettes are persons who have attained their majority,
20 and if there is no advertising, they will inhibit adults
21 from buying cigarettes. That may be a laudable thing to do,
22 but that isn't what the aim of this ordinance is.

23 We live in a large community, Your Honor. We have
24 like I believe a hundred municipalities surrounding the city
25 of St. Louis. If an automobile driver drives by and he

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1 doesn't see cigarettes for sale in the city, he can drive
2 right on out to the county where they don't have an
3 ordinance and buy them out there. So this ordinance doesn't
4 really serve any useful purpose. What we're doing is
5 punishing citizens of the city of St. Louis, who, like
6 George Kaiser, are trying to make a living.

7 We also contend, our third point, that the
8 ordinance involves 42 U.S.C. 1983 because it deprives -- the
9 ordinance is under color of law and it deprives people like
10 George Kaiser of their First Amendment civil rights.

11 You know, we rely on a lot of cases, Your Honor,
12 and they're in the brief, but I really commend to your
13 attention Judge Sessions' opinion, very, very recent
14 opinion, within the last couple of months in the Rockwood
15 case up in Vermont, and he points out at the end of his
16 opinion, he says, The City -- the city in Vermont that
17 was -- I think it was the City of Preston, The City is to be
18 commended for its desire to combat adolescent smoking. And

19 the City is to be commended. We commend them. My clients
20 join with them in commending this effort to combat
21 adolescent smoking.

22 And by the way, the evidence will show, Your
23 Honor, that our -- my clients are doing their job. The
24 evidence is going to show that the Missouri Retailers
25 Association, for example, conducts educational seminars for

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1 its membership that teaches small retail operators and their
2 clerks how to card people and how to make sure those cards
3 are legitimate. It's interesting, Your Honor, I found out
4 something I didn't know until yesterday, actually. The FDA
5 has a regulation that says people who sell cigarettes should
6 card people unless they look 27. Now, you can sell
7 cigarettes to minors who are 18, but there's a buffer of
8 security there. So my client, George Kaiser, for example,
9 if he sees someone who doesn't look 27, he cards them. Even
10 though persons who are 18 to 27 can smoke, he follows that
11 FDA regulation. He has a sign in his window or on the
12 cashier's counter, I forget which, that says, We card
13 minors. So my people are to be commended, too, if Your
14 Honor please, for their desire to combat adolescent
15 smoking.

16 But as Judge Sessions said, Congress has reserved
17 the right to regulate tobacco advertising and the states and
18 the cities may not do that, and as Judge Sessions said,
19 advertising must receive the protection it's entitled to
20 under the First Amendment. So we ask that the temporary
21 restraining order that Your Honor entered orally on
22 September 10 and in writing on September 18 be made
23 permanent. Thank you, Your Honor.

24 THE COURT: Mr. Banks.

25 MR. BANKS: May it please the Court.

12

1 THE COURT: Mr. Banks.

2 MR. BANKS: Good morning. I'd like to begin by
3 apologizing to the Court, to opposing counsel, and to the
4 busy witnesses for us arriving late this morning. Our
5 calendar reflected we were supposed to be here at 9:30. We
6 apologize for the inconvenience and it will not happen
7 again.

8 THE COURT: That's all right. Don't worry about
9 it.

10 MR. BANKS: I'll also try to demonstrate my
11 penance by keeping my objections to an absolute minimum, as
12 I tried to do during the opening statement, because I
13 thought we got pretty far away from what we thought the
14 evidence was going to show and got into discussions of the
15 law, and we think that that can better be served in another
16 venue and for that reason the City of St. Louis will
17 announce that later on this morning, the other members of
18 the trial team, Carl West Yates and Michelle Smith, will
19 file with the Court a written motion to dissolve the
20 temporary restraining order and to dismiss the request for a
21 permanent and a preliminary injunction.

22 In addition to that, while we do believe that an
23 analysis of the facts via the witnesses will be of some
24 limited value to the Court, we do believe that this is an
25 issue that will primarily turn on the law as opposed to the

13

1 facts, so for that reason we formally request of the Court
2 leave to file written suggested findings of fact and
3 conclusions of law and we would ask for two weeks in order

4 to file that.

5 On to the opening statement regarding what it is
6 anticipated that the evidence will show. Whatever we have
7 done to the least of these his children, we have done to him
8 also. Whatever we have done to the least of these his
9 children, we have done to him also. What the City is trying
10 to do by means of its ordinance is to protect the least of
11 those, his children. Those people who are most susceptible
12 to temptation. Those people who are most amenable to be led
13 down the primrose paths. Those people who have not reached
14 the age of majority. Those individuals who have not
15 developed the type of lifetime experiences where they can
16 enjoy the powers of discernment. All the City of St. Louis
17 is trying to do by this ordinance is what it's entitled to
18 do, which is to protect the young people.

19 For the sake of argument, we will acquiesce that
20 perhaps the federal government, in their not so infinite
21 wisdom, has preempted the overall issue of tobacco
22 advertising. However, the Eleventh Amendment to the United
23 States Constitution still gives states and municipalities
24 some semblance of power, and there has not been a complete
25 abrogation so that we have to just lie back and play dead

14

1 under the might of these tobacco companies. The
2 municipalities still have the abilities to protect the
3 interests of the young people, and the evidence will show
4 that however much the members of the Board of Aldermen,
5 however much the members of the Clergy Coalition would have
6 liked to have been a little bit more restrictive in their
7 approach to tobacco advertising, they recognized that there
8 were legal limits, so instead of having a complete ban of
9 tobacco advertising in the City of St. Louis, they passed a
10 law which has reasonable limits, which are designed to
11 protect the young people.

12 Those reasonable limits are a sight restriction of
13 2,000 feet and it only applies to certain areas, such as
14 parks, schools, day-care centers, and it's replete with
15 exceptions, exceptions which will allow these merchants of
16 death to continue to pedal their poison. I was chagrined
17 driving to work this morning, saw that nice pretty bus stop
18 on Market Street, and what do they have on there? An
19 advertisement from Camel tobacco company, the people who
20 brought us Joe Camel. Joe Camel. We know what they've
21 tried to do to the young people.

22 Now, even if this Honorable Court had not put the
23 temporary restraining order in effect, presumably they would
24 have still been allowed to have that despicable, low-class,
25 distasteful advertising in front of City Hall. Why?

15

1 Because of the exceptions.

2 We're not trying to do away with advertisements
3 all over the city. We're not trying to prevent the tobacco
4 company from engaging in their multi-million-dollar
5 advertising campaign so that it stops everybody. The
6 evidence will show that all the City of St. Louis is trying
7 to do is to protect the young people, those people who are
8 not old enough, those people who are not smart enough, those
9 people who are not mature enough to avoid the manipulation
10 from the tobacco company and would be likely to fall prey to
11 their sophistry, get hooked on tobacco, and continue to use
12 tobacco for the rest of their life. The City of St. Louis
13 will show that it made a reasonable effort to do what's
14 still allowed under the Constitution, and that's to protect

15 the health and morals of the young people of the City of
16 St. Louis.
17 THE COURT: You may call your first witness.
18 MR. KOHN: Your Honor, at this time I would like
19 to offer in evidence a stipulation of facts --
20 THE COURT: You may do so.
21 MR. KOHN: -- that Mr. Banks and I have agreed
22 to. May I approach the bench?
23 THE COURT: You may approach. The Court receives
24 the stipulation.
25 MR. KOHN: I've marked that as Plaintiff's

16

1 Exhibit 1 for identification, Your Honor.
2 At this time, Your Honor, I'm calling a witness
3 out of turn. Pastor Rice is -- has an important engagement
4 across the street at the City Hall and, while he is under
5 subpoena, we want to accommodate him and make sure that he
6 can get over to the City Hall as soon as possible, and
7 therefore I will call him out of turn. Pastor Rice, would
8 you please come forward and be sworn.
9 PASTOR B.T. RICE,
10 called as a witness on behalf of the Plaintiffs, was
11 affirmed, and testified as follows:
12 THE COURT: Before counsel begins, I'll ask the
13 witness to spell first and last name, please, for the
14 record.
15 THE WITNESS: My name is Pastor, B as in boy, T as
16 in Tom, Rice, R-I-C-E.
17 THE COURT: Thank you, sir. You may inquire.
18 DIRECT EXAMINATION

19 BY MR. KOHN:
20 Q. And what is your address, sir, for the record?
21 A. [DELETED]
22 Q. Is that in [DELETED]?
23 A. [DELETED]
24 Q. [DELETED]
25 A. Oh, I'm sorry, [DELETED]

17

1 home address.
2 Q. Yeah. Well, you live at -- well, let's put it
3 this way, you live in [DELETED]
4
5 A. Yes.
6 Q. That's in [DELETED]; is that right?
7 A. Yes.
8 Q. And as I understand it, you're pastor of the New
9 Horizon Seventh Day Christian Church; is that correct?
10 A. Yes, uh-huh.
11 Q. And, sir, are you affiliated with an organization
12 known as the St. Louis Clergy Coalition?
13 A. Yes.
14 Q. And what is your position with that coalition?
15 A. I'm the president.
16 Q. What is the Coalition? Could you describe it for
17 the Court, please.
18 A. It's a group of ecumenical church or faith leaders
19 throughout the St. Louis metropolitan area and we come
20 together on issues that affect our community.
21 Q. How long has it been in existence, sir?
22 A. Fourteen years.
23 Q. And how many members do you have?
24 A. One hundred and thirty-nine.
25 Q. Now, did there come a time, Pastor, that the

1 Coalition became concerned that Joe Camel ads on billboards
2 were influencing young people to smoke?

3 A. Yes.

4 Q. And was it the Coalition's concern that if young
5 people did smoke, it would have a bad effect on their
6 health?

7 A. Yes.

8 Q. And did the Coalition therefore decide to seek
9 legislation to stop cigarette advertisements on billboards
10 and on other signs?

11 A. In certain areas, yes.

12 Q. In certain areas. Was that a recommendation of a
13 committee of the Coalition?

14 A. Yes.

15 Q. And what was the name of that Coalition -- that
16 committee?

17 A. Health Issues Committee.

18 Q. And what is -- what's the purpose of the Health
19 Issues Committee; what do they do?

20 A. One of the things that they do is to deal with
21 issues as it pertains to the health of the community, like
22 health care, clinics, et cetera, issues that affect the
23 health of the community.

24 Q. And did the Health Issues Committee generate a
25 proposal to have an ordinance and present that to the

1 executive committee of your organization for their approval?

2 A. Yes.

3 Q. And did the executive committee approve it?

4 A. Yes.

5 Q. And did the executive committee then bring that
6 proposal forward to the total membership and get them to
7 vote on it?

8 A. Yes.

9 Q. And did they vote in favor of seeking what has
10 become the ordinance in question?

11 A. Yes.

12 Q. Now, after the membership approved the
13 recommendation of the Health Issues Committee, did the
14 Coalition contact an alderperson here in the City of
15 St. Louis to see if an alderperson would introduce the
16 legislation?

17 A. Yes.

18 Q. And whom did you contact?

19 A. Alderwoman Bennice King Jones (sic).

20 Q. Jones King?

21 A. Jones King.

22 Q. And did she agree to sponsor the legislation?

23 A. Yes.

24 Q. Now, directing your attention, sir, back a little
25 ways to May 31, 1998, did a group out of the health care

1 issues committee of the Coalition have a meeting on that
2 Sunday at the Monumental Baptist Church on Page Boulevard?

3 A. Yes.

4 Q. And did you attend?

5 A. Yes.

6 Q. And did you speak?

7 A. Yes.

8 Q. And did you express your view at that meeting that
9 tobacco ads lure children into a lifetime of addiction,
10 disease, and early death?

11 A. I certainly did.
12 Q. And that is your view today?
13 A. Yes.
14 Q. And it is your view that the reason you wanted
15 this legislation is to prevent that?
16 A. Partially, yes, uh-huh.
17 Q. And that's why you wanted these ads eliminated;
18 isn't that right, sir?
19 A. That's certainly one of the reasons.
20 Q. Did you appear before one of the aldermanic
21 committees that was considering the ordinance that
22 Alderwoman Jones King introduced?
23 A. Yes.
24 Q. And did you speak in favor of the ordinance at
25 that time?

21

1 A. Yes, sir.
2 Q. And did you tell the aldermen that you favored the
3 bill because tobacco causes sickness and ultimately death?
4 A. Yes.
5 Q. And did you state at that meeting, sir, that too
6 many ministers have prepared far too many funerals as a
7 result of disease that is impacted by tobacco?
8 A. No, I didn't state that they had prepared. I said
9 that they had preached far too many.
10 Q. Preached, okay. It might have been a
11 typographical error in the Post-Dispatch, which is where I
12 got that.
13 A. All right.
14 Q. Or maybe my secretary typed it up wrong.
15 A. Okay.
16 Q. Okay. Now, after the ordinance passed, it
17 passed -- and the record is already in that it passed July
18 17 and was signed by the mayor on August 12 of this year.
19 After the ordinance passed and was signed, do you recall
20 participating in a press conference on September 1 regarding
21 the ordinance?
22 A. Yes.
23 Q. And did you say at the press conference that
24 tobacco was a drug and that when used as directed, it will
25 lead to pain, suffering, and early death?

22

1 A. Probably did.
2 Q. Or words to that effect?
3 A. Words to that effect, yeah.
4 Q. And certainly that was a major reason you wanted
5 this ordinance passed, wasn't it, sir?
6 A. Yes.
7 Q. Now, in supporting the legislation, sir, did the
8 Coalition propose that these signs be limited to signs that
9 were within 2,000 feet of schools, parks, day-care centers,
10 and recreation centers?
11 A. Yes.
12 Q. Actually, the Coalition wanted a total ban, didn't
13 you, and then you compromised and put in the 2,000-foot
14 restriction?
15 A. I can't really recall, but I certainly know that
16 we certainly came to agreement on the 2,000 feet, but it may
17 have been some difference in footage there, but I don't
18 remember what it is.
19 Q. Was there any study -- was there any study
20 conducted, sir, to see if you have a 2,000-foot restriction,
21 how much of the geographical area of the city that would

22 cover?

23 A. I'm not so sure I understand. Would you --

24 Q. Well, isn't it a fact, sir, that if you had -- if
25 you can't have a sign within 2,000 feet of a school, or

23

1 2,000 feet of a park or a day-care center or a recreation
2 center, that, as a practical matter, that covers virtually
3 the entire city?

4 MR. BANKS: Objection, Your Honor, leading. Any
5 time you start off a question with, "Isn't it a fact,
6 sir" --

7 THE COURT: Wait, wait, wait. Okay. Counsel, so
8 we don't get off to a bad start, you just tell me your
9 objection and I'll then decide how to make the analysis.
10 Your objection is leading?

11 MR. BANKS: The objection is leading.

12 THE COURT: It's sustained.

13 MR. BANKS: It's outside the --

14 THE COURT: It's sustained. You don't have to
15 make a speech. Just make your legal objection.

16 BY MR. KOHN:

17 Q. Sir, let me rephrase that. Did the Coalition or
18 the Board of Aldermen, to your knowledge, did they do any
19 study to show what geographical area of the city would be
20 protected by this ordinance so that you couldn't have a sign
21 within that geographical area?

22 A. I think that our purpose was that we wanted to
23 eliminate the signs where children and kids mostly
24 congregated, and that was what our objective was.

25 Q. Do you know if your objective was narrowly drawn;

24

1 in other words, do you know whether your objective was too
2 broad in implementation of the ordinance so that the
3 ordinance covers more than just children and that indeed it
4 covers virtually the entire metropolitan area? Did you
5 check that out to see?

6 A. We were confident that if we included the areas
7 that are included, that we certainly would -- would impact
8 children and kids that were in those areas and so that's
9 what our -- that's what we wanted to do, and tried to
10 alleviate as much impact on the kids and the children as we
11 possibly could, yeah, yes.

12 Q. But did you see whether -- how much of the
13 geographical area of the city would be covered by this
14 ordinance and this 2,000-foot restriction?

15 A. Yeah, we would certainly want to cover as much of
16 the area that impacted children and that's -- and so, for
17 example, if we're talking about a recreation area within
18 2,000 feet, that's where -- that's where we basically were
19 interested in doing it.

20 Q. Well, did you study to see whether the area
21 covered was actually the entire city of St. Louis?

22 A. You mean does the ordinance affect the entire
23 city?

24 Q. Yes.

25 A. Yes.

25

1 Q. And it does?

2 A. To my knowledge it does, yes.

3 Q. Now, has the Coalition taken other steps to stop
4 minors from smoking?

5 A. Yes.

6 Q. Does the Coalition encourage pastors to speak at

7 their churches about the evils of smoking?
8 A. Yes, we do.
9 Q. And does the Coalition offer stop smoking
10 seminars?
11 A. We encourage stop smoking seminars and we offer
12 places and people and organizations that provide that, yes.
13 Q. And do you distribute literature that you can get
14 your hands on at large gatherings to encourage people not to
15 smoke?
16 A. Yes, we have.
17 Q. And I take it those stop smoking seminars and that
18 literature, that's addressed to both adults and children.
19 Certainly you want both adults and children to stop smoking,
20 don't you?
21 A. I think that would be a good idea, but I think
22 we're really trying to target in so if you don't start, you
23 don't have to stop, so our kids.
24 Q. Do you believe, Pastor, that one reason minors
25 smoke is because of the pressure from their peers?

26

1 A. I would have to guess that that could be. I think
2 another reason that they do is because that it's made to
3 appear macho and on the in and cool and that you've arrived
4 if you have a cigarette in hand, and so we certainly want to
5 dispel that as much as we can.
6 Q. Did you do any studies to show that, to back you
7 up? You said you were guessing. Did you do any studies to
8 back you up on that?
9 A. On what now?
10 Q. On whether children smoke because they see signs
11 out there of a Marlboro man or something with a cigarette or
12 a beautiful woman smoking a cigarette or a Camel ad with
13 a -- we used to have Joe Camel, he's been banned --
14 A. Yeah.
15 Q. -- but a Camel ad with an attractive person on
16 it? Did you do any studies to see whether that causes
17 children to initiate smoking?
18 A. Well, yes, and by virtue of the fact that these
19 tobacco companies have placed these ads here that lure young
20 people, then obviously they're doing it to do it, and our
21 studies show that we want to keep them from doing it, and so
22 certainly we would spin off from that.
23 Q. Now, what study have you made, sir?
24 A. No, the -- I hope I'm saying this right in
25 answering your question. If -- if tobacco companies have

27

1 invested money to, in our view, lure young people into a
2 lifetime of addiction, then it is clear to us that what we
3 need to do is to try to halt that luring and to give them
4 some other images that are more positive.
5 Q. So let me see if I understand this, Pastor. You
6 know as a matter of life experience that the cigarette
7 companies are spending many millions of dollars on
8 billboards, right?
9 A. Yeah, many dollars, uh-huh.
10 Q. Many dollars?
11 A. Yes, sir.
12 Q. And it's your feeling that they're doing this to
13 lure children into smoking?
14 A. In some cases, yes, uh-huh.
15 Q. And that's your belief?
16 A. Yes.
17 Q. But you haven't done any study before you

18 introduced -- asked --

19 A. Oh, I see.

20 Q. -- Alderwoman Jones King to introduce this
21 ordinance that would corroborate your feelings on that?

22 A. Well, we've done studies -- and I'm sorry, I just
23 kind of grabbed what you're saying. We found out that
24 children begin smoking somewhere between the ages of 8 to
25 12, and those are the kinds of studies that we have done

28

1 that convinced us that we needed to do something to combat
2 that, yes.

3 Q. And that's the study. The studies that you did
4 were studies that show that smokers, a lot of smokers begin
5 smoking when their age is 8 to 12?

6 A. That's certainly one, and I think there are
7 additional studies that let us know that children take off
8 from these ads the subliminal suggestions that says that
9 it's cool, that it's on the in to be able to partake in
10 these --

11 Q. Well, have you seen any such studies, sir?

12 A. That that's how kids think?

13 Q. Yes, yeah.

14 A. I don't recall, but I probably have. I've seen
15 a lot of different studies and statistics, maybe, if that's
16 the same thing.

17 Q. Could you tell me the name of any such study?

18 A. I can't recall right now.

19 Q. Or the date of any such study?

20 A. I can't recall right now.

21 Q. Or the author of any such study?

22 A. Not right here and now, I can't recall.

23 Q. Well, getting back to my original question, do you
24 believe that one of the reasons, at least one of the
25 reasons, Pastor, that children smoke is because of pressure

29

1 from their friends?

2 A. Oh, from their friends.

3 Q. Yeah.

4 A. Your original question was --

5 Q. Yeah, I used a fancy word. I said "peers." I
6 should have just said friends.

7 A. Okay. I thought you said "parents."

8 Q. Oh, okay. Well, that was my next question.

9 A. Oh, okay.

10 Q. Let's talk about their friends.

11 A. I think that probably has some effect on them,
12 too, sure.

13 Q. And how about because their parents smoked, do you
14 believe that that's one of the reasons?

15 A. I think that probably has some impact as well.

16 Q. Now, when you asked Alderman Jones King to
17 introduce this ordinance which was the subject of this case,
18 were you aware, sir, that there is an ordinance in effect in
19 the City of St. Louis that makes it illegal to sell
20 cigarettes to minors?

21 A. Yes.

22 Q. And did you know that the penalty for doing that
23 is \$500?

24 A. Yes.

25 Q. Would you be in favor of strict enforcement of

30

1 that ordinance?

2 A. Yes.

3 Q. And do you know whether it is being strictly
4 enforced?
5 A. I think there's probably some effort put there,
6 but we'd like to see more.
7 Q. Would you like to see that ordinance expanded a
8 little bit to make it a violation of the ordinance
9 punishable by 90 days in jail, which is what this ordinance
10 does?
11 A. Certainly so.
12 Q. Would you like to see an ordinance in place that
13 would impose a forfeiture of a minor's driver's license if
14 he's found in possession of cigarettes?
15 A. Personally I think that would be effective as
16 well.
17 Q. And would you like to see an ordinance that would
18 make it illegal for a child to possess cigarettes?
19 A. Yes, all of the above.
20 Q. Wouldn't that type of a legislation be a lot more
21 effective than this ordinance?
22 MR. BANKS: Objection, leading, Your Honor.
23 THE COURT: Sustained.
24 BY MR. KOHN:
25 Q. Do you think that kind of legislation would be

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1 more effective than the legislation that we have here before
2 us today?
3 A. No.
4 Q. Okay. Would you favor an ordinance which makes
5 vendors have to get a license to sell cigarettes, a
6 cigarette licensing ordinance, making each person who sells
7 cigarettes pay a little money, get a license to sell? Would
8 you be in favor of that?
9 A. I'd be in favor of us not having them selling
10 cigarettes at all, so, you know, whatever --
11 Q. Anything within that, you would be in favor of,
12 that's the bottom line, right?
13 A. Yeah, yeah.
14 Q. Now, do you understand, sir, that the ordinance
15 that's in effect permits signs that encourage people not to
16 smoke?
17 A. Was I aware? Say that -- ask me again. I'm
18 sorry.
19 Q. Here, well, let me help.
20 A. Yeah.
21 Q. Here's a billboard we happened to see the other
22 day. "Keep smoking and cough up a lung. It's your life."
23 That's a billboard that warns people not to smoke, right?
24 A. Right.
25 Q. You would -- do you understand -- is it your

32

1 understanding of the current ordinance that that kind of
2 billboard is permitted?
3 A. I hope so, yeah.
4 Q. But if there's another ordinance -- if there's
5 another sign right up next to it that says, "Smoke
6 Marlboros," the ordinance prohibits that as you understand
7 the ordinance, right?
8 A. Yes.
9 Q. And you favor that ordinance under those
10 circumstances?
11 A. If there is an ordinance that says that that's all
12 right to put up? Is that what you're saying?
13 Q. No, this ordinance. Is it your understanding that

14 this ordinance permits that sign (indicating) and prohibits
15 a sign that says "Marlboros For Sale"?

16 A. I really don't know. I don't know the answer to
17 that.

18 Q. Okay.

19 MR. KOHN: That's all I have, Mr. Banks.

20 THE COURT: You may inquire, Mr. Banks.

21 CROSS-EXAMINATION

22 BY MR. BANKS:

23 Q. Good morning, Pastor Rice.

24 A. Good morning.

25 Q. Pastor Rice, when did you stop working for the

33

1 local news media?

2 A. When did I stop working for them?

3 Q. Yes, sir.

4 A. I never did.

5 Q. You never worked as a reporter or anything?

6 A. No.

7 Q. You've never written a news story?

8 A. No.

9 Q. Do you serve as some type of consultant to the
10 media where they have to get your permission regarding what
11 they attribute to you?

12 A. No.

13 Q. Have they ever asked you to proofread one of their
14 stories before it appeared?

15 A. No.

16 Q. So you cannot personally guarantee the accuracy of
17 anything that maybe the media has attributed to you?

18 A. No.

19 Q. Let's assume, though, for the sake of discussion,
20 that everything the media has attributed to you was
21 absolutely positively correct, and you've made some general
22 statements regarding the overall horrors of tobacco
23 smoking. Let's assume for the sake of argument that's
24 true. Would that mitigate in any way your desire, when you
25 pushed for this ordinance, to protect the young people?

34

1 A. No.

2 MR. BANKS: Thank you. I have no further
3 questions.

4 MR. KOHN: I have none, Your Honor.

5 THE COURT: You may step down, sir. Thank you.

6 MR. KOHN: Thank you very much. I hope you make
7 your meeting. Your Honor, as my next witness, I would call
8 George Kaiser.

9 THE COURT: Okay.

10 GEORGE JOSEPH KAISER, JR.,
11 called as a witness on behalf of the Plaintiffs, was sworn,
12 and testified as follows:

13 DIRECT EXAMINATION

14 BY MR. KOHN:

15 Q. Sir, would you state your full name for the
16 record.

17 A. George Joseph Kaiser, Jr.

18 Q. And what is your business address?

19 A. It's 5000 South Grand.

20 Q. Is that in the city of St. Louis?

21 A. Yes, it is.

22 Q. And is that in South St. Louis?

23 A. Correct.

24 Q. Where is that -- is it on the corner?

25 A. It's on the corner of Grand and Delor.

35

1 Q. And what ward is that in?

2 A. The 13th Ward.

3 Q. Who is your alderman?

4 A. Fred Wessels.

5 Q. And where is that, say, for example, I know where

6 Grand and Chippewa is. Where is it in relation --

7 A. It's about a mile and a half farther south of

8 there.

9 Q. Farther south. Now, what business are you in,
10 sir?

11 A. I have a convenience store, gasoline, and car wash
12 business.

13 Q. And what is the name of your business?

14 A. Kaiser Grand Mart.

15 Q. And how long has that facility been in your
16 family?

17 A. Since 1936, but not as a convenience store.
18 Since -- we did this change in '97. Before that time, it
19 was a gasoline and repair shop.

20 Q. And did your dad start it in '36?

21 A. That's correct.

22 Q. Now, who works with you at that location?

23 A. My wife, my two sons. It's been, I guess, a
24 family business since '36.

25 Q. Now, let me see if I understand. Before '97 when

36

1 you made some changes, as I hear you, it was a gasoline
2 station; is that correct?

3 A. And repair shop.

4 Q. And repair shop. You did repairs on automobiles?

5 A. That's correct.

6 Q. And then in '97 you changed that.

7 A. Correct.

8 Q. Tell me how you changed that.

9 A. Well, we took the existing building, if this is
10 what you mean, and just completely gutted it and then put in
11 a regular convenience store and then added on to a building
12 for the car wash.

13 Q. You have an automatic car wash?

14 A. Yes.

15 Q. And a convenience store. And how about gasoline?

16 A. And gasoline, yes.

17 Q. Serve yourself gasoline?

18 A. Right, self serve.

19 Q. Now, in your convenience store, what items do you
20 sell?

21 A. Of course cigarettes, tobacco, cigars, alcohol,
22 beer, just beer products, bread, the normal things that you
23 would find in a regular convenience store.

24 Q. Coffee?

25 A. Coffee, soda.

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1 Q. Now, let me show you an exhibit so we can -- by
2 the way, you didn't happen to bring a carton or a package of
3 cigarettes with you, did you?

4 A. I did bring one.

5 Q. That you sell, the kind you sell?

6 A. Yeah.

7 Q. Let me see it.

8 A. (Witness complies.)

9 (THEREUPON, Plaintiff's Exhibit No. 19 was

10 marked for identification.)
11 Q. Let me hand you, sir -- return to you this package
12 of cigarettes which you have given me and which I have now
13 marked as Plaintiff's Exhibit 19, and ask you, sir, if that
14 is an example of cigarettes that you sell at your store?
15 A. Yes, it is.
16 Q. And does it have any warnings on it?
17 A. It has on the side of the package here.
18 Q. Why don't you read that into the record.
19 A. "Surgeon General's Warning."
20 Q. Wait a minute. I'm sorry. Go a little slower so
21 I can hear you.
22 A. Okay. "Surgeon General's Warning: Smoking By
23 Pregnant Women May Result in Fetal Injury, Premature Birth,
24 And Low Birth Weight."
25 Q. Does it say anything about sale to minors?

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1 A. No, it doesn't.
2 Q. Let me see that.
3 A. (Witness complies.)
4 Q. Well, here, let me -- I thought there was
5 something there. Let me call your attention to the top of
6 the place where you read that warning, and ask you what it
7 says right at the top there.
8 A. Oh, "Underage Sale Prohibited."
9 Q. Thank you. Mr. Kaiser, I've put up on the easel
10 Exhibit 2, I think I marked that, yes, which is a photograph
11 which says "Kaiser Grand Mart." Would you identify that
12 exhibit for us, sir?
13 A. Yes, that's the store, partial part of the store.
14 Q. And that's after you did your renovation?
15 A. Correct.
16 Q. And that was in '97?
17 A. If that blue tarp was there, I would have made
18 sure it was removed.
19 Q. You would have dressed up your place a little if
20 you knew the photographer was going to be out there?
21 A. Yeah.
22 Q. All right. Now, I'm going to put up on the easel
23 Exhibit 3. Would you identify that?
24 A. That's the Marlboro sign that we have out there
25 close to the sidewalk, or actually on the sidewalk.

39

1 Q. Well, see, sir, I'm having a hard time hearing
2 you.
3 A. Yes, that's our Marlboro sign that we've had there
4 for years with no problems at all.
5 Q. Okay. But, generally speaking, that's where your
6 self serve gas is?
7 A. Correct.
8 Q. And it looks like you're selling Phillips 66 gas?
9 A. That's correct.
10 Q. And then you have a freestanding sign that says
11 "Marlboros"?
12 A. That's correct.
13 Q. And then below the "Marlboro," it says, hard to
14 read maybe from here, but I believe it says "Self
15 Service" --
16 A. Correct.
17 Q. -- "Hot Coffee, Soft Drinks"?
18 A. That's correct.
19 Q. And I'm putting up on the easel, sir, Plaintiff's
20 Exhibit 4. Is that sort of a closeup of Exhibit 2 here?

21 A. That's correct.
22 Q. Okay. And you've got some -- looks like some
23 inside signs that can be seen from the outside; is that
24 correct?
25 A. That's correct.

40

1 Q. And what is that one on the left?
2 A. That's a Camel sign advertising Camel cigarettes.
3 Q. And that's located on the inside of the window,
4 but it's visible on the outside, right?
5 A. That's correct, yes.
6 Q. And then what's that little sign there on the
7 right-hand side below ATM?
8 A. That's where it says "We Care So We Card." It's a
9 cigarette -- letting children know that they can't buy
10 cigarettes at our store.
11 Q. Now, where would -- does someone provide with you
12 that sign?
13 A. Yes, that was provided.
14 Q. Who provides that to you?
15 A. I imagine the tobacco industry.
16 Q. Is that your best understanding?
17 A. That's correct.
18 Q. Now, do you have customers who are in the
19 neighborhood?
20 A. Yes, we sure do.
21 Q. Do you have customers that drive by and come in
22 that aren't from the neighborhood?
23 A. That's right, they come from all over, even
24 Illinois.
25 Q. And when you have an ad that says Camels or it

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1 says Marlboros, do you enter into any kind of promotional
2 arrangement with these tobacco manufacturers?
3 A. We sure do. It's called a buy-down where we
4 actually get a discount on the different brands of
5 cigarettes, and then that way we can advertise different
6 specials for that time of the month or that time of the
7 year, where they'll give us a better price on the cigarettes
8 so we can advertise, put a price sign out there so people
9 know that we have a bargain going for them at that time.
10 Q. And do you have one of these promotional buy-downs
11 pending at the present time?
12 A. Not at the present time, no.
13 Q. When was the last time you had one pending?
14 A. It's about a month and a half, two months ago.
15 Q. And was that a buy-down?
16 A. That's correct.
17 Q. And did that go into effect?
18 A. Yes, it did.
19 Q. Now, that sign there that says "We Care So We
20 Card," how do you enforce that warning or that sign?
21 A. Well, when someone comes to the store and doesn't
22 look of age, first of all I'll just say, you know, You don't
23 even look like -- you have to look 27 and that really shoots
24 them down. I've had a lot of instance where verbal abuse
25 and really having a lot of problems in that respect where

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1 they even were old enough, but I didn't know it because they
2 didn't have an ID with them.
3 Q. Well, here, but my question is, you say a person
4 comes in to buy cigarettes, right?
5 A. Correct.

6 Q. And let's say they look like they're 26, what do
7 you do?
8 A. I'll still card them.
9 Q. And if their card shows that they are 18 or more,
10 do you sell them?
11 A. Yes. In fact, when we do ring up the sale, we
12 have a function on our register that will actually put the
13 date on that sale, so if there's a question that they would
14 come back, the police or anyone would come back stating
15 that, you know, this child is underage, we have it on our
16 tape showing the actual date of their -- you know, when they
17 were born. And we've had some people actually try to give
18 us a card with them being younger than 18 and the register
19 will not allow the transaction.
20 Q. So you make a written record of how old?
21 A. That's correct.
22 Q. Everyone you've carded, how old everyone you've
23 carded is?
24 A. It's on the receipt, yes.
25 Q. Now, are there any schools near your convenience

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1 store, sir?
2 A. Yes, there is, St. Mary's High School.
3 Q. And is there a St. Celia's?
4 A. There is a St. Cecilia's, too.
5 Q. Is that within 2,000 feet?
6 A. If you would go a straight point, I'm sure it is,
7 from Point A to B, a straight line, it might be.
8 Q. How about St. Joseph's Home for Boys?
9 A. Yes.
10 Q. Is that within 2,000 feet?
11 A. Yes, uh-huh.
12 Q. Now, are there other convenience stores in the
13 neighborhood with whom you compete, sir?
14 A. Yes, we have a cigarette outlet one block down and
15 then two more blocks there's a 7-11.
16 Q. Could you give us some sort of a ballpark figure,
17 sir, as to how your volume is in dollars of your cigarette
18 sales?
19 A. In dollars?
20 Q. Yes.
21 A. Somewhere -- the last couple of months it's been
22 running between 20 to 24,000 a month in cigarette sales.
23 Q. And how does that compare with your total
24 convenience store sales, excluding car washes and gasoline?
25 A. And gasoline, I'd say between 10 and 15 percent.

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1 Q. And do you believe that your -- do you have an
2 opinion as to whether your sales would be affected by this
3 ordinance?
4 A. Yes, I do.
5 Q. What's your opinion?
6 A. I feel that I would be stymied as far as competing
7 with my competition, that just as far as advertising the
8 gasoline, the prices of gasoline, I wouldn't be able to
9 advertise the special buy-downs on cigarettes, so I wouldn't
10 be able to compete with my competition.
11 Q. Have you had experience with gasoline and putting
12 up signs on how much the gasoline price is?
13 A. For sure, yes, you know, we post the price and we
14 are told one way or the other, your price is either too high
15 or too low many times, and we conform to whatever the
16 situation may be at that time.

17 Q. So it's your feeling that people are doing
18 comparative shopping?
19 A. For sure, yes.
20 MR. KOHN: Your Honor, I'd offer in evidence
21 Exhibit 19 and Exhibits 2, 3, and 4.
22 THE COURT: Received.
23 MR. KOHN: That's all I have.
24 THE COURT: You may inquire, Mr. Banks.
25 CROSS-EXAMINATION

45

1 BY MR. BANKS:
2 Q. Mr. Kaiser, you're a multi-million-dollar-a-year
3 operation, are you not?
4 A. I would be over a million, yes, for sure, a
5 million to two. Probably somewhere between 1 and 2 million,
6 maybe a little more now in the present, not previous.
7 Q. I invite your attention to the affidavit which you
8 executed which was filed along with the temporary
9 restraining order. And you didn't write this affidavit, did
10 you?
11 A. No.
12 Q. In fact, you didn't even see the affidavit until
13 it was presented to you for your signature; isn't that
14 correct?
15 A. That's wrong.
16 Q. I'm sorry?
17 A. No, I had a chance to read the affidavit and then
18 review it and then had the -- they had to come down to have
19 me sign the affidavit.
20 Q. Did you offer any changes?
21 A. No.
22 Q. So it was written perfectly the first time?
23 A. Yeah, any time someone violates my rights, I'm
24 very far, you know, opposing it, and it was written, you
25 know, pretty close to what I expected. As far as the verse

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1 for verse on law, no, I didn't -- I didn't -- I didn't
2 follow that at all. I was mainly concerned about my rights
3 violation.
4 Q. The affidavit was written perfectly the first
5 time; isn't that correct?
6 A. It was fine enough for me, yes.
7 Q. It was fine enough for you. It was written for
8 you, it was presented to you, you read it, you had no
9 changes, and you signed it?
10 A. That's correct.
11 Q. And paragraph 3 on page 2 of that affidavit says,
12 "Sales of tobacco products at Kaiser Grand Mart make up
13 approximately 10 to 15 percent of total revenues generated
14 annually by the Mart and a higher percentage of profits. I
15 sell about \$280,000 in tobacco products annually."
16 A. That -- okay, that figure was high.
17 Q. That figure was high?
18 A. Yes.
19 Q. So this affidavit wasn't perfect?
20 A. No, it wasn't.
21 Q. Is there anything else that was not perfect in
22 this affidavit that you'd like to tell us about now?
23 A. Sir, I don't think anything is perfect in this
24 world, so I don't know, you know, line for line, no, nothing
25 was perfect in that affidavit.

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1 Q. Is there anything else in your affidavit that you

2 would like to change at this point?
3 A. That was the only thing that I read. After I read
4 it, I realized that the sales were showing too high.
5 Q. And you do of course say on page 4 of your
6 affidavit, "I state and affirm under the penalties of
7 perjury that the foregoing is true and correct." You say
8 that, right, right above your signature?
9 A. Yes.
10 Q. And right below that the notary public does say,
11 "Subscribed and sworn to before me this 10th day of
12 September, 1998."
13 A. Yes.
14 Q. So you don't think the \$280,000 figure that you
15 gave in your sworn affidavit under penalties of perjury is
16 correct. What figure do you think is correct now?
17 A. You mean total sales of cigarettes? I'd say close
18 to \$200,000 a year. This is projected because we've only
19 done this since December of '97 and these are projected
20 sales.
21 Q. \$200,000 a year in tobacco sales?
22 A. That's correct.
23 Q. And that's between 10 to 15 percent of your
24 earnings?
25 A. Of sales.

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1 Q. Of your sales. So you multiply \$200,000 a year by
2 10 and what figure do you get?
3 A. That's 2 million.
4 Q. You multiply it by 15, and what figure do you get?
5 A. Thirty-five -- let's see, what are you saying, two
6 times --
7 Q. 200,000 times 15.
8 A. Okay. It would be 6, 6 million.
9 Q. Can we go with maybe two and a half million?
10 A. Yeah, I'm sorry, two and a half million.
11 Q. So you're a multi-million-dollar operation; isn't
12 that correct?
13 A. Yes.
14 Q. So any type of portraying of you as a small
15 mom-and-pop operation would not be accurate, would it?
16 A. Well, I would consider compared to other
17 locations, yes, we're not up to the top -- elite top ten as
18 far as in sales of other things, no.
19 Q. Now, you didn't always sell all of these tobacco
20 products, did you?
21 A. We did sell cigarettes, but on a lot smaller
22 scale.
23 Q. You decided to change your operation when your
24 neighborhood changed; isn't that correct?
25 A. That had one of the effects, yes, the neighborhood

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1 change.
2 Q. Now, before you opened up your convenience store,
3 you did a little informal marketing research; isn't that
4 correct?
5 A. That's true.
6 Q. And within a year before you opened up your
7 convenience store, you went to over 20 other different
8 convenience stores checking out their operation; isn't that
9 correct?
10 A. That's correct.
11 Q. And sometimes you'd only maybe buy a pack of gum
12 so you could get in there on the inside and see what they

13 had going on?
14 A. Correct.
15 Q. And you didn't stop your informal marketing
16 research at that point. Even after you opened up your
17 convenience store, you checked out about 20 other
18 convenience stores; isn't that correct?
19 A. That's correct.
20 Q. And in those 40 convenience stores that you
21 checked out, you never found one of them that did not sell
22 cigarettes; isn't that correct?
23 A. That's correct.
24 Q. And that's because most people know that when they
25 go to a convenience store, they can get cigarettes?

50

1 A. Correct.
2 Q. And in fact, you've never had anybody come into
3 your store and say, Oh, boy, I didn't know you sold
4 cigarettes.
5 A. No, but I've been asked about different prices on
6 cigarettes, as far as what the price of them are.
7 Q. I invite your attention to your Exhibit 3. And
8 oh, by the way, you're not a member of the Missouri
9 Retailers Association, are you?
10 A. No.
11 Q. And as a matter of fact, you've dealt with lawyers
12 before, right?
13 A. Yes.
14 Q. But you were recruited into this lawsuit, weren't
15 you?
16 A. Not -- let's put it this way. They approached me,
17 but knowing my rights, I would have been doing this on my
18 own without any help from anyone.
19 Q. You're not paying attorney's fees for this, are
20 you?
21 A. No, but I would. If necessary, I would.
22 Q. And it's your understanding that the tobacco
23 companies are paying for the attorney's fees, isn't it?
24 A. That's right.
25 Q. Invite your attention to Plaintiff's Exhibit

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1 No. 3. Once again for the sake of discussion, would you
2 tell us what that middle item is?
3 A. I can't tell from here.
4 MR. BANKS: May I approach, Your Honor?
5 THE COURT: You may. Which exhibit number,
6 Mr. Banks?
7 MR. BANKS: Exhibit 3, Your Honor.
8 A. "Self Service" and Hot -- yes, "Self Service."
9 BY MR. BANKS:
10 Q. What's above "Self Service"?
11 A. "Marlboro."
12 Q. In the big letters, right?
13 A. Correct.
14 Q. So when you said "Self Service," you were talking
15 about the small letters?
16 A. Yes.
17 Q. Not the big letters that says "Marlboro"?
18 A. That's their sign.
19 Q. Now, what is diagonally across the street from
20 you?
21 A. That's a closed shop.
22 Q. I'm talking about --
23 A. Oh, diagonally. That would be St. Mary's High

24 School and St. Joseph's Home.

25 Q. And where your sign is located, somebody from

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1 St. Mary's High School couldn't even come into your shop
2 without seeing that Marlboro sign, could they?

3 A. No, I don't think so, no.

4 Q. Yet you're negotiating trying to get you another
5 Marlboro sign?

6 A. Correct.

7 Q. Now, I invite your attention to Plaintiff's
8 Exhibit 19, where it reads, "Surgeon General's Warning:
9 Smoking By Pregnant Women May Result in Fetal Injury,
10 Premature Birth, And Low Birth Weight." Have you ever seen
11 a cigarette package that doesn't have a warning on it?

12 A. No.

13 Q. So the fact that your cigarette packages have
14 warnings on it, that doesn't mean too much because every
15 cigarette package has a warning on it?

16 A. Correct.

17 Q. It's not any kind of indicator of your magnanimity
18 or anything like that, is it?

19 A. No.

20 Q. Now, you don't have any type of studies that shows
21 that people would not come into your store to buy cigarettes
22 if you didn't have the signs out there, do you?

23 A. My own study, being in business for years for
24 gasoline, I could -- you know, my own, you know, seeing
25 sales of gasoline, when I have different prices out there,

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1 it affects the sale of my gasoline sales, I can attest to
2 that. And the same thing would be as far as cigarettes, if
3 I couldn't promote the different prices on buy-downs, it
4 would affect my sales.

5 Q. Speaking of buy-downs, how much of a kickback does
6 the cigarette industry give to you because of these
7 advertisements?

8 A. It could run anywhere from 30 -- 20 to 30 or
9 40 cents a pack.

10 Q. And what would be the dollar revenue associated
11 with that?

12 A. That I don't have off the top of my head. I don't
13 really know exactly.

14 Q. Now, you don't have any type of studies that
15 indicates that perhaps if the people didn't spend their
16 money on tobacco, maybe they'd have a little bit of extra
17 money to spend on Twinkies or Zingers or Oreo Cookies or
18 something like that?

19 A. Which would all affect someone's health.

20 Q. Would you like to categorize --

21 A. Well, I'm saying that, you know, if you're going
22 to take away the cigarette sales, where is the next stop?
23 Is it going to be the beer and then the Twinkies, you know,
24 because that's not good for your health either, so where is
25 the line going to be drawn in this?

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1 Q. Have you ever heard of anybody dying from cancer
2 caused by Twinkies?

3 A. I guess not cancer, but I'm sure being overweight,
4 yes, a lot of people get heart disease and then they do, you
5 know, pass away because they're overweight. Same thing with
6 beer products, they become alcoholics and the same thing.
7 So I think if you try to start with cigarettes, where is it
8 going to lead? That's my question there, too.

9 Q. So in your mind, Twinkies, Zingers and Oreo
10 Cookies are just as dangerous as cigarettes?
11 A. If they don't have any control over how many they
12 eat, yes.
13 Q. Do young people come into your store?
14 A. Yes.
15 Q. Do young people see your tobacco ads from outside
16 of your store?
17 A. The one in the window at the present time, yes.
18 Q. And there is not anything that would make it
19 physically impossible for you to take one of those in the
20 window, tobacco ads, and put it someplace else, would it?
21 A. It would be defeating the purpose.
22 Q. But it wouldn't be impossible to change the
23 location?
24 A. Nothing is impossible.
25 Q. Wouldn't even be improbable?

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1 A. No.
2 Q. Wouldn't even be inconvenient?
3 A. No, it wouldn't be inconvenient, no.
4 MR. BANKS: Thank you. I have no further
5 questions, Your Honor.
6 THE COURT: Redirect.
7 REDIRECT EXAMINATION
8 BY MR. KOHN:
9 Q. Mr. Kaiser, Mr. Banks asked you about young people
10 do come into your store?
11 A. That's correct.
12 Q. And they see signs that are on the inside of your
13 store as well as signs that are on the outside of your
14 store?
15 A. That's correct.
16 Q. And I've marked this as an exhibit.
17 THE COURT: What number?
18 MR. KOHN: No. 6, Your Honor.

19 BY MR. KOHN:
20 Q. Is that, sir, one of the signs that minors will
21 see when they come into your store?
22 A. That's correct.
23 Q. And that is not visible from the outside?
24 A. No.
25 Q. And that sign says, "Our cashier really stinks at

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1 guessing ages, so if you don't (sic) want cigarettes, can we
2 see some ID," right?
3 A. That's correct, yes.
4 Q. Who pays for that sign, do you know?
5 A. I'm sure the tobacco industry does.
6 Q. Is that at the cash register? Where is that sign
7 located?
8 A. Right, that's right at the register. If they're
9 going to purchase anything in the store, they're going to
10 see that sign.
11 Q. It's right on the counter where you check out?
12 A. That's right.
13 Q. Now, Mr. Banks said you were a
14 multi-million-dollar operation. If you have \$2 million in
15 sales, does that mean you have \$2 million in profits?
16 A. No, by no means. Far from it.
17 Q. That's the amount of sales.
18 A. Right.
19 Q. You have a lot of expenses?

20 A. And a lot of debt.
21 Q. And you have a lot of debt because of this change
22 you made.
23 A. That's correct, which I could have done anywhere,
24 but I decided to stay in St. Louis.
25 Q. And the big item I guess on those sales is the
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1 cost of the things you sell?
2 A. Right.
3 Q. You don't manufacture them.
4 A. No.
5 Q. So you have to pay for the things and then you
6 resell them?
7 A. That's correct.
8 Q. So your profits aren't anywhere near what your
9 sales are.
10 A. Nowhere near, no.
11 MR. KOHN: That's all I have.
12 MR. BANKS: No further, Your Honor.
13 THE COURT: You may step down. We'll take about a
14 15-minute recess.
15 (THEREUPON, a recess was had from 10:10 a.m.
16 to 10:30 a.m.)
17 THE COURT: You may proceed.
18 MR. KOHN: Your Honor, I would like to offer in
19 evidence the Exhibit 6, which is on the --
20 THE COURT: Received.
21 MR. KOHN: -- board. And then if Your Honor
22 please, as I understand it without objection from Mr. Banks,
23 I'm going to offer Exhibits 2-A, 3-A, 4-A, and 6-A. These
24 are 8 by 10 copies of the larger exhibits.
25 THE COURT: 2-A, 3-A, 4-A?
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1 MR. KOHN: And 6-A.
2 THE COURT: They are smaller copies?
3 MR. KOHN: Yes, and I thought I'd approach the
4 bench and hand them to Your Honor.
5 THE COURT: Received. Thank you.
6 MR. KOHN: Thank you. Mr. Overfelt, would you
7 take the stand, please.
8 SAM OVERFELT,
9 called as a witness on behalf of the Plaintiff, was sworn,
10 and testified as follows:
11 THE COURT: You may inquire.
12 MR. KOHN: Thank you, Your Honor.
13 DIRECT EXAMINATION
14 BY MR. KOHN:
15 Q. Sir, for the record, would you state your name
16 once again.
17 A. Sam Overfelt.
18 Q. And what is your business address?
19 A. 618 East Capital Avenue, Jefferson City, Missouri,
20 Post Office Box 1336, Zip Code, 65102.
21 Q. And how are you employed, sir?
22 A. I'm an attorney, but I am employed as president
23 and secretary of the Missouri Retailers Association.
24 Q. And how long have you been with them, sir?
25 A. I've been with the organization since August 1,
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1 1971.
2 Q. And how long has the Missouri Retailers
3 Association been in existence?
4 A. Since nineteen hundred and thirty-three.

5 Q. And was that incorporated by a court order here in
6 the City of St. Louis?

7 A. Yes, it was.

8 Q. How many members does the association have,
9 approximately?

10 A. Oh, approximately 100 to 150.

11 Q. And do some of those members have multiple
12 business outlets?

13 A. Yes, sir, they do.

14 Q. Do you know how many business outlets your
15 association represents through the membership?

16 A. Approximately 2 to 3,000 outlets.

17 Q. And could you give me the name -- names of some of
18 your members?

19 A. Yes, sir. K-Mart, Wal-Mart, Walgreen's,
20 Dierberg's, Schnuck's, May Company, and independent stores
21 as well.

22 Q. So as the name implies, does your association have
23 as its members retailers that are located in Missouri?

24 A. Yes, sir.

25 Q. What is the purpose of the association?

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1 A. One of the purposes of the association, other than
2 trying to raise enough money to pay the bills each month,
3 which sometimes gets difficult, is to work on matters
4 involving rules and regulations which, if promulgated, have
5 the effect of law and work with the members of the general
6 assembly and agencies of state government on issues that may
7 adversely or favorably impact the retail industry, to report
8 to our people, and to get their analyzation, and to try to
9 make sure that either amendments are offered or bills are
10 passed that will not only serve the public interest, but as
11 well as the welfare of the people we represent.

12 Q. And are you generally familiar with the ordinance
13 that's the subject of this lawsuit?

14 A. Just in general.

15 Q. And your organization is a plaintiff in this
16 case. I take it you're opposed to it.

17 A. Yes, sir.

18 Q. And why are you opposed to it?

19 A. Because it could have the effect of either fining,
20 causing our people to be incarcerated, or cause us to lose
21 our right to sell a lawful product.

22 Q. Now, does your organization oppose the sale of
23 cigarettes to minors?

24 A. Yes, sir.

25 Q. And does your organization participate in any

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1 activities to discourage underage smoking?

2 A. Yes, we do.

3 Q. What do you do? Can you give me some examples?

4 A. Well, the We Card Program, which is a program
5 devised by the industry, is an attempt to provide
6 information to stores and to clerks around the state that it
7 is unlawful to sell to -- cigarettes to minors. We've had
8 meetings where we believe approximately 300 people attended
9 training sessions in regard to the We Card Program, to help
10 stores better comply with the federal law, as well as state
11 law, that prohibits the sale of cigarettes to minors under
12 the age of 18, and the We Card Program of course cards
13 people up to the age of 27 to make sure that they don't have
14 someone get through the loop.

15 MR. KOHN: May I approach, Your Honor?

16 THE COURT: You may approach. Thank you.
17 BY MR. KOHN:
18 Q. Sir, let me -- I have handed you, in fact, what's
19 been marked as Plaintiff's Exhibit 7. Could you identify
20 that for us?
21 A. Yes, sir. It's a -- actually a -- what I would
22 call an announcement of various seminars that were held in
23 St. Louis, Jefferson City, Kansas City, and Springfield, a
24 training session for the clerks and owners of stores as to
25 how they should be careful as they sell cigarettes to

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1 people, and especially be careful about cards that may in
2 fact be fraudulent, other methods or ways that people may
3 try to procure cigarettes who are not legally supposed to
4 purchase them.
5 Q. And was your organization one of the sponsors of
6 these training seminars?
7 A. Yes, sir, it was, and other members of ours, the
8 Missouri Grocers Association, the Ozark Empire Grocers, the
9 Retail Grocers Association of Kansas City.
10 Q. At these seminars, do you make presentations to
11 the clerks who actually are engaged in selling products to
12 customers?
13 A. Yes, sir.
14 Q. And do you educate them as to the age requirements
15 for selling cigarettes to --
16 A. We do.
17 Q. -- persons? Do you educate them as to what IDs
18 can be accepted and what IDs are unacceptable?
19 A. Yes, sir.
20 Q. And do you teach them how to spot fake IDs?
21 A. Yes, and it's somewhat difficult because with the
22 new computers, you can almost make fake IDs look like an
23 identical original and good IDs.
24 MR. KOHN: That's all I have, Your Honor. I offer
25 into evidence Plaintiff's Exhibit 7.

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1 THE COURT: Received.
2 MR. KOHN: Eric, I'm offering Exhibit 7. Do you
3 have any objection?
4 MR. BANKS: No objection, Your Honor.
5 THE COURT: It's received.
6 MR. BANKS: Thank you, Your Honor.
7 THE COURT: You may inquire, Mr. Banks.
8 MR. BANKS: Thank you, sir.
9 CROSS-EXAMINATION

10 BY MR. BANKS:
11 Q. Good morning, Mr. Overfelt.
12 A. Good morning, sir.
13 Q. Mr. Overfelt, you have approximately 100 to 150
14 members of your association?
15 A. Yes, sir.
16 Q. And that's the Missouri Retailers Association?
17 A. Yes, it is.
18 Q. And of those 100 to 150 members, you only have
19 about 12 members in the St. Louis area; isn't that correct?
20 A. Yes, sir, that is specific members of the
21 association. I also mentioned in there -- in the question
22 you asked me the other day that we represent the Missouri
23 Grocers Association, and after I went back to Jefferson City
24 and called John Morrison, there are 40 stores in the city of
25 St. Louis that are members of his and we represent them also

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1 at the State Capitol in regard to governmental matters and
2 issues that are -- we're concerned with in the Department of
3 Revenue, Weights and Measures and Agriculture, Taxation, of
4 course, with Revenue, Merchandising Practices Act under the
5 Attorney General's Office. These are all areas of concern
6 to all retailers and to the Grocers Association. So in
7 addition to the 12 stores we mentioned the other day, I did
8 mention the Missouri Grocers Association, but I didn't
9 mention the total number that are in the city of St. Louis
10 that belong to the association. That's another 40. So it
11 gives us, I would say, 52 members in total.

12 Q. Subject to that explanation, you only have 12
13 nonassociate members of your organization; isn't that true?

14 A. That's correct.

15 Q. And certainly some of those members don't even
16 sell cigarettes or food products or tobacco products, such
17 as Famous Barr doesn't sell it, does it?

18 A. Not to my knowledge.

19 Q. And you didn't consult with Famous Barr when you
20 decided to file this lawsuit, did you?

21 A. No, I did not.

22 Q. In fact, you didn't file this lawsuit because of
23 one of those 12 members calling you and complaining about
24 some harm they thought they were going to experience, did
25 you?

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1 A. I agreed to participate in the lawsuit at the
2 request of a member of the association.

3 Q. And what member was that?

4 A. The Tobacco Institute. In addition, Philip Morris
5 is a member of our association and worked with us on the We
6 Care Program. They are also members of the association.

7 Q. And in fact, Philip Morris's advertising company
8 is the entity that made you aware of the ordinance in the
9 first place; isn't that correct?

10 A. I believe that's correct, yes.

11 Q. And their name is the O'Connor Group?

12 A. Yes, sir.

13 Q. And you don't -- your association does not own any
14 stores in the St. Louis area, does it?

15 A. No, we do not.

16 Q. And your association does not operate any stores
17 in the St. Louis area?

18 A. No, we are a trade association and represent a
19 variety of stores, including convenience stores, department
20 stores, discount stores, pharmaceutical outlets. People
21 like Quiktrip are our members.

22 Q. And Mr. Kaiser, he's not a member of your
23 association?

24 A. No, sir, he is not.

25 Q. When is the first time you met Mr. Kaiser?

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1 A. Last week when I was leaving the office and he was
2 going in to give a deposition to you.

3 Q. Over at my office?

4 A. At your office, yes, sir.

5 Q. So it wasn't like Mr. Kaiser called you up and
6 said, Hey, I'm a prospective member of your association.
7 Can you help me out here?

8 A. No. I asked him in fact this morning if he was a
9 member of the Missouri Grocers Association and he said he
10 was not. I asked him if he knew the people who had operated
11 the association in St. Louis for many years and he didn't

12 know them, but I'm sorry that he isn't a member.
13 Q. Your members have not suffered any harm as a
14 result of this ordinance, have they?
15 A. Not yet.
16 Q. And in fact, you have not performed any type of
17 studies or done anything which would suggest that they would
18 suffer irreparable harm or actual damages if this ordinance
19 were allowed to go into effect; isn't that correct?
20 A. I have done no such studies.
21 Q. And you have several members that sell tobacco,
22 but they don't have advertising that's visible from the
23 street; isn't that correct?
24 A. We have members who sell tobacco in some instances
25 where signs are not visible from the street. However, there
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1 are certain members of the association that do have signs
2 that are small in nature, but they can be visibly seen
3 through a window or a door.
4 Q. Isn't Target one of your members that sells
5 tobacco products, but they don't have anything that's
6 visible from the street?
7 A. Target does not sell tobacco products.
8 Q. What about your other members? What about
9 Walgreen's?
10 A. Walgreen does sell tobacco products.
11 Q. And do you know whether or not Walgreen's has
12 advertisements which can be seen from the street?
13 A. I know of one instance that I observed yesterday
14 on Lindell, through the window you could see a Marlboro
15 sign, but -- I know this was back in the store, but it could
16 be seen from the street.
17 Q. You don't have any type of studies that support
18 the contention that members who have signs that can be seen
19 from the street do better than members who don't have signs
20 that can be seen from the street, do you?
21 A. I have no study.
22 MR. BANKS: Thank you. Your Honor, I have no
23 further questions.
24 THE COURT: Redirect?
25 MR. KOHN: Just a few questions. If I may
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1 approach the bench, Your Honor?
2 THE COURT: You may approach.
3 REDIRECT EXAMINATION
4 BY MR. KOHN:
5 Q. Mr. Overfelt, in response to questions by
6 Mr. Banks, you said you were aware of some stores in
7 St. Louis which are members of your association; is that
8 correct?
9 A. Yes, sir.
10 Q. Now, I've handed you what has been marked as
11 Exhibit 6 for identification. Could you --
12 THE COURT: I show 6 as being already received.
13 It's a photo, tobacco pasteboard.
14 MR. KOHN: That's correct.
15 THE COURT: You'll make it 8?
16 MR. KOHN: We'd better make it 8. Thank you, Your
17 Honor. Okay. Thank you, Your Honor. We're changing that
18 to 8.
19 (THEREUPON, Plaintiff's Exhibit No. 8 was
20 marked for identification.)
21 BY MR. KOHN:
22 Q. Would you identify Exhibit 8, sir.

23 A. Exhibit 8 shows the name of the store and address
24 that one of your associates and I visited yesterday,
25 which -- from which cigarette advertising can be seen.

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1 Q. You went -- these are all in the city of
2 St. Louis?

3 A. Yes, sir.

4 Q. Three Quiktrip stores; is that correct?

5 A. Yes, sir.

6 Q. And a Schnuck's?

7 A. Yes.

8 Q. Walgreen's?

9 A. Yes.

10 Q. T & T Foods?

11 A. Yes, sir.

12 Q. Laclede Market?

13 A. Yes, sir.

14 Q. And Manchester Market?

15 A. Yes, sir.

16 Q. Those stores are all members of the Missouri
17 Association?

18 A. Yes.

19 Q. Retailers Association? And you observed those
20 stores and you saw cigarette ads that were inside, but
21 visible from the outside; is that --

22 A. That's correct.

23 MR. KOHN: That's all I have, Your Honor. Well, I
24 offer in evidence Exhibit 8.

25 THE COURT: Received.

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1 MR. KOHN: If I didn't offer it, Exhibit 7.

2 THE COURT: 7?

3 MR. KOHN: Exhibit 7, yes, that would be the Free
4 Sessions. Register Today. I offer Exhibit 7.

5 THE COURT: It's received.

6 MR. BANKS: Nothing further, Your Honor.

7 MR. KOHN: Nothing further, Your Honor.

8 THE COURT: You may step down.

9 MR. KOHN: Thank you, Mr. Overfelt.

10 THE COURT: You may call your next witness,
11 Mr. Kohn.

12 MR. KOHN: I would like to call Alderwoman
13 Jones King.

14 ALDERWOMAN BENNICE JONES KING,
15 called as a witness on behalf of the Plaintiff, was sworn,
16 and testified as follows:

17 DIRECT EXAMINATION

18 BY MR. KOHN:

19 Q. Good morning.

20 A. Good morning.

21 Q. Would you please state your name once again for
22 the record.

23 A. Bennice Jones King.

24 Q. And what is your address, ma'am?

25 A. My home residence [DELETED].

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1 Q. And are you an alderperson [DELETED]?

3 A. Yes, I am.

4 Q. And what ward is that?

5 A. 21st Ward.

6 Q. And is that in the northern part of the city?

7 A. Yes, it is.

8 Q. And how long have you been an alderperson?

9 A. I'm in my fifth year now.
10 Q. Now, Alderwoman Jones King, were you the principal
11 sponsor of the sign ordinance that's here in question today?
12 A. Yes.
13 Q. And did someone, perhaps Pastor Rice, recommend
14 that ordinance to you?
15 A. Yes.
16 Q. And did you sponsor that legislation because of
17 your concern about the health of minors?
18 A. Yes.
19 Q. And did you go through your neighborhood and look
20 and see if there were a lot of billboards out there that
21 advertise cigarettes?
22 A. Yes, I did.
23 Q. And you saw there were a lot of them?
24 A. I saw that there were some, yes.
25 Q. And after you saw that and talked to Pastor Rice,

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1 did you ask the legal advisor to the Board of Aldermen,
2 Mr. Pat Connaghan, to prepare an ordinance that would ban
3 those kind of signs?
4 A. Yes, I did.
5 Q. And did you ask Mr. Connaghan to talk to Pastor
6 Rice about what the ordinance should say?
7 A. Yes, I did.
8 Q. And after it was drafted, you introduced it; is
9 that correct?
10 A. That's correct.
11 Q. And was it referred to a committee?
12 A. Yes, it was.
13 Q. Do you recall which committee, by any chance?
14 A. The Legislation Committee after given the
15 information.
16 Q. And did you speak to the Legislation Committee?
17 A. During the committee hearing, yes.
18 Q. During the committee hearing?
19 A. Yes.
20 Q. And that's a public hearing, I take it, right?
21 A. Yes, it is.
22 Q. And did you tell the committee that you felt this
23 ordinance was important because it helped protect the health
24 and wellness of minors?
25 A. Yes, I did.

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1 Q. And including your two young sons? You have two
2 young sons?
3 A. Yes, I do.
4 Q. And do you know, before you introduced the
5 ordinance, or even today, what the percentage of minors in
6 the city of St. Louis is that smokes?
7 A. I'm not specifically sure of the percentage, but I
8 know the percentage is high.
9 Q. Is it your understanding that the percentage of
10 underage smoking at the present time is starting to be at a
11 stall right about now?
12 A. I don't know that to be factual, no.
13 Q. Well, here, I'm not trying to quibble with you
14 here, Alderwoman Jones King, but your deposition was taken
15 in this case, was it not?
16 A. Yes.
17 Q. And I'm looking at pages 22 and 23 and I want to
18 read you what you said at that time.
19 "Question: Do you know whether the percentage of

20 underage smokers are increasing or decreasing?
21 "Answer: From my understanding and still
22 listening to some of the media and doing some reading on my
23 own, the number is starting to be right at a stall right
24 about now."

25 Do you remember -- I think it was Ms. Pake asked

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1 you that question and you gave that answer?

2 A. Yes, I do.

3 Q. That was a true answer, wasn't it?

4 A. Yes.

5 Q. Okay. Did you do any studies before you
6 introduced this ordinance as to whether minors initiate
7 their smoking because of advertising signs?

8 A. Did I go out and physically do a study?

9 Q. Yes. Did you do a study or did you study a study
10 that showed whether underage smoking was initiated by
11 advertising signs?

12 A. No, I didn't do a study study.

13 Q. Did you study whether other countries that have
14 banned cigarettes and banned cigarette advertising have
15 higher rates of underage smoking than countries that permit
16 advertising?

17 A. No.

18 Q. If it were the case that there were studies that
19 showed that advertising bans in other countries did not
20 decrease the amount of smoking by underage persons, would
21 that have affected you in any way in introducing this
22 ordinance?

23 A. Would you repeat that again?

24 Q. In other words, if there were a study out there
25 that showed that in Finland, let's say, they have a ban on

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1 advertising signs and yet the incidence of smoking among
2 minors is greater percentage-wise than it is in the United
3 States, would that have affected your interest in
4 introducing this legislation?

5 A. No, it would not have.

6 Q. Are you aware whether the board had any
7 documentation that advertising causes minors to start
8 smoking?

9 A. That the Board of Aldermen?

10 Q. Yes, that the Board of Aldermen or the committee
11 or yourself have any documentation, any documents that would
12 show that advertising causes minors to start smoking.

13 A. No, none that I know of.

14 Q. Now, Dr. Dillworth, she spoke at either before the
15 board or the committee, did she not?

16 A. She spoke at the committee hearing.

17 Q. And she talked about -- she was in favor of the
18 legislation, was she not?

19 A. Yes, she was.

20 Q. And she spoke about the reason that she was in
21 favor of it, did she not?

22 A. Yes, she did.

23 Q. And did she say that she thought it was important
24 because it would help the health of minors?

25 A. Yes, she did.

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1 Q. Do you feel, Alderman Jones King, that a minor's
2 decision to smoke is affected by whether his or her friends
3 smoke?

4 A. I think it has some impact, yes.

5 Q. And do you think a minor's decision to smoke is
6 affected by whether his parents or those living in his
7 household smoke?
8 A. It may have some impact, yes.
9 Q. Now, do you understand, Alderman Jones King, there
10 is an ordinance in effect, that's in effect as we speak,
11 which makes it illegal to sell cigarettes to minors?
12 A. Yes.
13 Q. And you know that the penalty for that, if someone
14 does sell cigarettes to minors, is a fine maybe up to \$500?
15 A. Yes.
16 Q. Do you know if there's been any efforts or what
17 efforts there have been to enforce that ordinance?
18 A. I really don't know of any enforcement, not in the
19 community in which I live, I don't see any enforcement.
20 Q. Have you -- who would enforce that? Would that be
21 the police that would enforce that ordinance, to your
22 understanding?
23 A. I would believe so.
24 Q. Would you consider stronger enforcement of that
25 ordinance as something that -- to be desired?

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1 A. Yes.
2 Q. And would you favor increasing the penalties to,
3 say, imprisonment like this present ordinance has?
4 A. Yes.
5 Q. And would you favor legislation that would make it
6 illegal for minors to possess cigarettes?
7 A. Yes.
8 Q. And would you impose fines of up to 90 days in
9 jail for minors who possess cigarettes?
10 A. Yes.
11 Q. And would you favor legislation that would impose
12 a forfeiture of a minor's driver's license if he were in
13 possession of cigarettes?
14 A. If that legislation was passed on the State lines,
15 yes.
16 Q. You wouldn't be in favor of it at the City level?
17 A. Well, we don't have any control over what happens
18 if a license is issued and it's a State ordinance.
19 Q. In other words, that's a State driver's license?
20 A. That's correct.
21 Q. It's not a City driver's license?
22 A. That's correct.
23 Q. And so that would be up to the State to impose
24 that kind of penalty?
25 A. Yes.

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1 Q. Now, do you understand that the ordinance in
2 question bans signs that promote the use of cigarettes?
3 A. Yes.
4 Q. And do you understand that the ordinance permits
5 signs that advocate not using cigarettes?
6 A. I'm sorry?
7 Q. I'm wondering if you understand that the ordinance
8 that we're considering here today permits signs that are
9 against smoking.
10 A. Yes.
11 Q. I think I -- I'll just put this right here. I
12 think I showed this to Pastor Rice. Here is a sign on a
13 billboard, "Keep smoking and cough up a lung. It's your
14 life." That kind of sign would be permitted under this
15 ordinance, would it not?

16 A. It sounds reasonable, yes.
17 Q. Because that's an anti-smoking sign?
18 A. Correct.
19 Q. And under this ordinance, as you understand it,
20 anti-smoking signs are permitted and smoking signs are not?
21 A. True.
22 Q. Here is an exhibit that we had here today, No. 2,
23 Mr. Kaiser's store.
24 A. Okay.
25 Q. He's identified it. Do you see that sign there

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1 that says "Camel"?
2 A. Yes, I do.
3 Q. Can you see that from there?
4 A. (Witness nods head up and down.)
5 Q. Do you believe that that little sign in the window
6 causes minors to start smoking if they haven't smoked
7 before?
8 A. I wouldn't say that that particular sign would,
9 no.
10 Q. But do you believe that a billboard would?
11 A. I think with a particular type of advertising,
12 yes, I do.
13 Q. What about a black-and-white sign that didn't have
14 any color or any pictures on it, would you believe that
15 would cause initiation of smoking?
16 A. It may or it may not. It depends on what it
17 actually says.
18 Q. Did you give any consideration to more narrowly
19 drawing your ordinance so that it prohibited signs that are
20 in color or signs that are on large billboards rather than
21 little signs that are in windows?
22 A. No.
23 MR. KOHN: That's all I have, Your Honor.
24 THE COURT: You may inquire, Mr. Banks.
25 MR. BANKS: Thank you, Your Honor.

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1 CROSS-EXAMINATION
2 BY MR. BANKS:
3 Q. Alderwoman, when it's all said and done, were you
4 primarily the sponsor of this ordinance because you were
5 motivated to protect the young people?
6 A. Yes, I was.
7 MR. BANKS: Your Honor, I have no further
8 questions.
9 MR. KOHN: Your Honor, I'd like to offer in
10 evidence this sign that I've shown to Alderwoman Jones King
11 and Reverend Rice.
12 MR. BANKS: Your Honor, I'm going to have to
13 respectfully object. There's improper foundation. We don't
14 know if this is a county sign, we don't know if it's a city
15 sign. Besides, the ordinance, which I believe the Court
16 already has in front of it or it can take judicial notice
17 of, is silent on the issue of anti-smoking advertising.
18 MR. KOHN: Let me say that this sign was in the
19 county, it was not in the city, but I'm offering it for
20 the -- to show that this type of sign, under the testimony
21 by Reverend Jones King -- Alderwoman Jones King and Reverend
22 Rice, that they would have no objection and it's their
23 understanding that this type of sign is permitted under this
24 ordinance.
25 THE COURT: What is the number on it?

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1 MR. KOHN: I'm going to give it a -- wait a
2 minute. I think it's got a number.
3 THE COURT: I think it's already in.
4 MR. KOHN: 14.
5 THE COURT: Okay. No. 14. For the record, No. 14
6 is a sign which advertises the harm of smoking or suggests
7 that by its content. The Court understands it is not a sign
8 that is located within the city. The limited offer will be
9 received for the limited purpose stated by Mr. Kohn, to show
10 that this type of sign, under the testimony by Reverend King
11 (sic) and Alderwoman Jones King, that they would have no
12 objection to its understanding that this type of sign is
13 permitted under the ordinance, and it's limited for that
14 purpose. I think I said -- it's Mr. B.T. Rice. For that
15 limited purpose, it's received.
16 MR. KOHN: Thank you, Your Honor.
17 THE COURT: Any other questions for the witness?
18 MR. KOHN: No, Your Honor.
19 THE COURT: You may step down, ma'am.
20 MR. KOHN: Thank you, Alderwoman Jones King, I
21 appreciate you coming in today.
22 MS. PAKE: Martie Aboussie.
23 MARTIE J. ABOUSSIE,
24 called as a witness on behalf of the Plaintiffs, was sworn,
25 and testified as follows:

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1 DIRECT EXAMINATION
2 BY MS. PAKE:
3 Q. Would you state your full name for the record.
4 A. Martie J. Aboussie.
5 Q. What is your address, Mr. Aboussie?
6 A. [DELETED]
7 Q. Is that in [DELETED]?
8 A. [DELETED]
9 Q. And do you have an official position within the
10 City of St. Louis?
11 A. I'm an alderman in the City of St. Louis
12 representing the 9th Ward.
13 Q. How long have you been an alderman?
14 A. Twenty-two years.
15 Q. Now, as you know, Alderman, we're here today in
16 regard to the City of St. Louis Ordinance 64463 relating to
17 restriction on signs. Are you familiar with that ordinance?
18 A. Yes, ma'am.
19 Q. You were a cosponsor of it?
20 A. I was a sponsor, cosponsor.
21 Q. And you voted in favor of it?
22 A. I did.
23 Q. Now, you first learned of an effort to pass
24 legislation relating to restrictions on tobacco signs when
25 you saw a rally on television; is that correct?

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1 A. I did.
2 Q. And your first personal involvement with respect
3 to the legislation was when you attended a committee meeting
4 where the bill was brought up for hearing; is that right?
5 A. Yes.
6 Q. And Reverend Rice was present at that meeting?
7 A. He was.
8 Q. You spoke with Reverend Rice?
9 A. On the way out I did.
10 Q. You told him that after you had had a chance to
11 review the bill, that you would consider being a cosponsor?

12 A. Yes.
13 Q. Now, do you have any specific recollection of the
14 substance of any discussion of the bill that took place at
15 that committee meeting?
16 A. I do not, other than they were making their
17 presentation, the sponsor did, and the people that were
18 speaking in favor of it. I sometimes am in and out of
19 committee meetings.
20 Q. There was no documentation that was formally
21 submitted to the committee in support of the legislation,
22 was there?
23 A. Not to my recollection.
24 Q. Nor was there any documentation submitted to the
25 full Board of Aldermen in support of passage of this

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1 ordinance, was there?
2 A. Not to my memory.
3 Q. Now, your general reaction to the bill was
4 favorable once you had reviewed it, correct?
5 A. It was.
6 Q. And you believe that tobacco should in general not
7 be sold or distributed to minors, correct?
8 A. Yes.
9 Q. And is that because they have nothing to gain in
10 terms of their future health if they take up smoking?
11 A. Yes, I think it should be instructed, instilled in
12 them at a young age, absolutely.
13 Q. And you are also in favor, then, of the existing
14 City laws that prohibit the sale of tobacco products to
15 minors?
16 A. I am.
17 Q. But you don't know how often that law is enforced,
18 do you?
19 A. I don't, but it is being enforced by the police
20 department.
21 Q. But you can't tell us in the last month how many
22 citations were issued under that ordinance?
23 A. I cannot.
24 Q. And prior to enacting this ordinance relating to
25 signs, the Board of Aldermen did not consider any proposed

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1 legislation relating to additional enforcement of that law
2 restricting sales to minors, did it?
3 A. Not to my knowledge.
4 Q. Nor do you recall a bill being submitted to the
5 Board of Aldermen that would have set up a fund on the part
6 of the City that would have funded anti-tobacco advertising?
7 A. No, I do not.
8 Q. Did the Board of Aldermen, to your knowledge,
9 commission any specific studies before it passed this
10 ordinance on the impact of tobacco advertising on youth
11 smoking?
12 A. No.
13 Q. Did the board commission any studies prior to the
14 passage of the ordinance to determine how many signs would
15 be affected by the ordinance?
16 A. No.
17 Q. Now, apart from the committee meeting you attended
18 and your review of the bill, you had no other personal
19 involvement with regard to your consideration of this bill
20 before you voted to pass it; is that correct?
21 A. Yes, ma'am.
22 Q. Alderman Aboussie, you have no specific knowledge

23 of the current prevalence of youth smoking in the city of
24 St. Louis, do you?

25 A. No.

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1 Q. Do you know whether it's increasing or decreasing?

2 A. No, I do not.

3 MS. PAKE: I have nothing further.

4 THE COURT: Just a second. Let me catch up on my
5 note-taking here. (Pause.) You may inquire, Mr. Banks.

6 MR. BANKS: Thank you, Your Honor.

7 CROSS-EXAMINATION

8 BY MR. BANKS:

9 Q. Alderman Aboussie, did you agree to serve as a
10 sponsor because you were motivated to try to protect the
11 young people?

12 A. Absolutely.

13 Q. Did you speak in favor of this board bill because
14 you were motivated to try to protect the young people?

15 A. I did.

16 Q. Did you vote for the passage of this bill because
17 you were motivated to try to protect the young people?

18 A. Yes.

19 MR. BANKS: Thank you. Your Honor, I have no
20 further questions.

21 MS. PAKE: No further questions, Your Honor.

22 THE COURT: You may step down, sir. Thank you.

23 THE WITNESS: Thank you, Your Honor.

24 MS. PAKE: Your Honor, at this time we would like
25 to play for the Court a very short videotape of the hearing

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1 before the Board of Aldermen when the bill was actually
2 passed on July 24, 1998. It's I think no more than ten
3 minutes long.

4 THE COURT: You may do so. What's the number on
5 the videocassette?

6 MS. PAKE: The videocassette is Exhibit 15.

7 THE COURT: 15?

8 MS. PAKE: Yes.

9 MR. BANKS: Your Honor, may we move?

10 THE COURT: Yes, sir.

11 MR. BANKS: Thank you.

12 THE COURT: 15 is received. If you care to, you
13 can turn it slightly so those in the audience can see it if
14 they have an interest, and they also can position themselves
15 so they can see it, too, if they care to.

16 (At this time, the videotape was played, after
17 which the following proceedings were had:)

18 THE COURT: Is there a transcript or will there be
19 a transcript made?

20 MS. PAKE: There is, Your Honor. We prepared
21 one. May I approach?

22 THE COURT: You want to mark that 15-A or is it
23 already marked?

24 MS. PAKE: Exhibit 16.

25 THE COURT: 16. It is received.

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1 MS. PAKE: Thank you.

2 THE COURT: You may call your next witness.

3 MS. PAKE: Your Honor, we would next like to offer
4 by stipulation a map which has been prepared to show the
5 geographic impact of Ordinance 64463 on advertising,
6 advocacy and promotion in the city of St. Louis. We have it
7 on a large board which has been marked 17-A, and I also have

8 a smaller size which has been marked Plaintiff's
9 Exhibit 17. May I approach?

10 THE COURT: You may. Thank you.

11 MS. PAKE: And the colored areas on the map
12 indicate the extent of the restriction under the ordinance.
13 We would now like to offer certain of defendant's answers to
14 interrogatories into evidence.

15 THE COURT: You may.

16 MS. PAKE: First is Interrogatory No. 6.

17 "State whether any study has been performed by or
18 on behalf of the City to determine how many signs are
19 affected by Ordinance 64463. If the answer is yes, identify
20 the individuals or entities involved in performing that
21 study, identify any documents evidencing the results of that
22 study, and identify the City personnel who reviewed that
23 study.

24 "Answer: No studies were performed as to how
25 many signs would be affected by the Ordinance 64463.

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1 "Interrogatory No. 7. State whether any study
2 has been performed by or on behalf of the City to determine
3 the number and location of signs that fall within Exception
4 4-F of Ordinance 64463. If the answer is yes, identify the
5 individuals or entities involved in performing that study,
6 identify any documents evidencing the results of that study,
7 and identify the City personnel who reviewed that study."

8 Defendant's answer to Interrogatory No. 7: "No
9 study was performed to determine the number and location of
10 signs that fall within Exception 4-F of Ordinance 64463."

11 And finally, Plaintiff's Interrogatory No. 8.
12 "State whether any study was performed by or on behalf of
13 the City, or whether any study was considered by the City
14 even if not prepared on its behalf, relating to the effects
15 of outdoor advertising controls on use of tobacco products
16 prior to the passage of Ordinance 64463. If the answer is
17 yes, identify the individuals involved in performing that
18 study, identify any documents evidencing the results of that
19 study, and identify the City personnel who reviewed that
20 study."

21 Defendant's answer: "There was no study performed
22 by or on behalf of the City relating to the effects of
23 outdoor advertising. The aldermen may have considered
24 testimony or interviews with individuals who based their
25 opinions on other studies. Said information may be more

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1 readily obtained through the members of the Board of
2 Aldermen."

3 MR. KOHN: Dr. Faber, would you please come
4 forward, be sworn, and take the witness stand.

5 RONALD J. FABER, Ph.D.,
6 called as a witness on behalf of the Plaintiff, was sworn,
7 and testified as follows:

8 DIRECT EXAMINATION

9 BY MR. KOHN:

10 Q. Would you, Doctor, once again --

11 MR. BANKS: Excuse me, Your Honor, may we explore
12 a housekeeping matter?

13 THE COURT: Yes.

14 MR. BANKS: Could we have an idea about how long
15 we'll be proceeding so we'll know about lining up our
16 expert?

17 THE COURT: I would assume we'll go until noon, or
18 we can go through noon, however you all would prefer. I

19 guess I should say until noon for everyone's convenience.
20 MR. BANKS: Thank you, Your Honor.
21 MR. KOHN: And this is our last witness.
22 THE COURT: All right. So is that --
23 MR. YATES: Are we going to take a break? I'm
24 sorry.
25 THE COURT: Yeah, we'll take about an hour break

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1 from like 12:00 to 1:00.
2 MR. YATES: Okay.
3 BY MR. KOHN:
4 Q. Again, sir, would you state your full name?
5 A. Ronald J. Faber.
6 Q. And what is your address?
7 A. [DELETED].
8 Q. And what is your occupation or profession?
9 A. I'm a professor at the University of Minnesota.
10 Q. And what do you teach there, sir?
11 A. I teach advertising, consumer behavior in the
12 School of Journalism and Mass Communication.
13 Q. And how long have you been there at the University
14 of Minnesota?
15 A. I've been at Minnesota for about ten years.
16 Q. I've handed you, sir, what's been marked as
17 Plaintiff's Exhibit 18. Is that your curriculum vitae?
18 A. Yes, it is.
19 Q. Now, tell me about your education and your
20 professional history, sir?
21 A. Okay. My education, I have a BS degree in
22 business, actually, technically I think it reads economics,
23 but it's business, from the University of Pennsylvania. I
24 have a master's degree in secondary education also from the
25 University of Pennsylvania, and I have a Ph.D. in mass

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1 communications from the University of Wisconsin.
2 Q. And tell me your teaching history.
3 A. Okay. Well, the most relevant history is that
4 I've been a professor at the University of Minnesota in the
5 School of Journalism for about ten years. Prior to that, I
6 was a professor -- associate professor at the University of
7 Texas in the Department of Advertising, and then I taught
8 while I was in graduate school.
9 Q. Do you -- have you taught or do you teach courses
10 at the school that relate to advertising?
11 A. Yes, most of the courses I teach relate to
12 advertising.
13 Q. Do you teach courses that relate to consumer
14 behavior --
15 A. Yes, I do.
16 Q. -- with respect to advertising?
17 A. I apologize. Yes, I teach a course called
18 Psychology of Advertising. That's basically a consumer
19 behavior course.
20 Q. Have you taught any courses that relate to the
21 development of quality research in advertising?
22 A. I teach courses in research design, I teach
23 courses of graduate seminar in advertising research and
24 theory, so a number of the courses touch on that. I teach a
25 course in advertising campaign planning where we also talk

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1 about looking at quality research.
2 Q. And have you taught courses -- did you say you
3 taught courses in advertising management? I'm not sure I --

4 A. I don't think I did, but I have also taught
5 courses in advertising management.

6 Q. Have you published articles on advertising as it
7 relates to consumer behavior?

8 A. Yes, the vast majority of my publications regard
9 advertising or consumer behavior.

10 Q. What journals or articles -- what journals, let's
11 say, have you written articles for in that area?

12 A. Okay. I've published in the Journal of
13 Advertising, Journal of Advertising Research, the Journal of
14 Consumer Research, the Journal of Advertising Research, the
15 Journal of Marketing, Psychology and Marketing. I'm sure
16 there are a number of others.

17 Q. And the -- have you -- how about the Journal of
18 Clinical Psychiatry?

19 A. Yes, I've also published there.

20 Q. And the Journal of Marketing? I don't know if you
21 mentioned that. You might have. I didn't catch it.

22 A. I don't know, but, yes, I have published there.

23 Q. Are you now or do you expect to be the editor of
24 any of those journals?

25 A. Starting in January, I will become the editor of

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1 the Journal of Advertising.

2 Q. And have you published an article in the Research
3 on Consumer Behavior Annual?

4 A. Yes, I have.

5 Q. Have you been a judge of quality advertising
6 campaigns?

7 A. Yes, for about the last five years I've been a
8 judge for what's called the Effie Awards, which is an
9 industry award for the top -- the most effective advertising
10 campaigns in the country.

11 Q. Have you been associated with any other groups
12 that make advertising -- that have advertising awards?

13 A. Yes. I'm a member of the board of directors of
14 the Advertising and Marketing Excellence Award, which also
15 awards honors for the most effective advertising and
16 marketing campaigns, both in the United States and
17 internationally.

18 Q. Are you a member of any advertising organizations?

19 A. I belong to the American Marketing Association,
20 the academy -- or the American Academy of Advertising, the
21 Association of Consumer Research, among others.

22 Q. How about the Advertising Marketing Effectiveness
23 International?

24 A. Yes, that also.

25 Q. Are you on the board of directors of that?

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1 A. Yes.

2 Q. How about the Association on Education and
3 Journalism and Mass Communication?

4 A. Yes, I also belong to that.

5 Q. Are you on the editorial boards of any advertising
6 journals?

7 A. Yes, I'm on the editorial board of the Journal of
8 Advertising, also the Journal of Current Issues and Research
9 in Advertising, and I'm also on the editorial board of some
10 consumer behavior journals.

11 Q. How about the Journal of Consumer Research?

12 A. Yes, that would be one of them. Also the Journal
13 of Consumer Policy.

14 Q. Have you been an ad hoc reviewer for any of these

15 journals or any other journals?
16 A. Yes, usually start as an ad hoc reviewer and then
17 ultimately get appointed to the editorial boards, but I've
18 also been ad hoc reviewer for a large number of other
19 journals in the areas of advertising, child development,
20 consumer behavior.

21 Q. Okay. Have you received any awards for your
22 reviews?

23 A. I was awarded an award last year from the Journal
24 of Advertising for the top reviewer.

25 Q. Now, sir, are you familiar generally with the

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1 ordinance that's in question today, 64463?

2 A. Yes, I am.

3 Q. Are you aware of the fact that it makes it illegal
4 to have signs advertising, advocating, or promoting the use
5 of tobacco within 2,000 feet of a park, school, day-care
6 center, or recreation center?

7 A. Yes, I'm aware of that.

8 Q. Do you have an opinion, sir, based on the
9 experience you've just told us about, as to whether
10 implementation of that ordinance will reduce minors' illegal
11 use of cigarettes or other tobacco products?

12 A. Yes, I do have an opinion about that.

13 Q. And what is your opinion?

14 A. My opinion is that enacting the ordinance would
15 not reduce underage or adolescent smoking.

16 Q. What effect, if any, do you think advertising has
17 on the decision to smoke?

18 A. I don't think that advertising has much or any
19 impact on the decision of whether or not to smoke, and it's
20 important to recognize, however, that there are really two
21 different decisions that get made. One is a decision to
22 smoke. The other, after that decision has been made, if one
23 chooses to smoke, what brand to smoke, and they're really
24 different decisions.

25 Q. What -- let's take the first one. What causes

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1 people, minors, adults, to smoke?

2 A. The evidence shows consistently, using a lot of
3 different methods, lots of different studies, that the No. 1
4 factor are peers, friends who smoke; the second is family,
5 both in terms of their behavior and even more importantly in
6 terms of their attitudes towards smoking; and then a third
7 factor we can kind of sum up as rights of passage,
8 curiosity, wanting to be older or more mature.

9 Q. Now, are friends and family influences on what is
10 right or wrong or acceptable behavior?

11 A. Very much so, yes.

12 Q. Well, you know, we see today and there's been some
13 testimony, I think, that a lot of money is spent every year
14 by the tobacco industry on advertising for smoking. Now,
15 why is all this money being spent on advertising if
16 advertising isn't causing people to initiate smoking?

17 A. Well, as I said, there are two separate decisions,
18 in that the money that is spent is not spent to advertise
19 smoking. What it's spent on is to advertise brands of
20 cigarettes, and it's there to try to do a number of things,
21 to reinforce existing brand loyalty so that people who smoke
22 one brand won't switch, and that's its primary function.
23 Secondly, it's there to try to encourage people who may
24 be what we refer to as brand switchers, people who will go
25 back and forth between a couple of different brands, to

1 become more loyal to one brand. And then finally, in rare
2 instances, it may encourage somebody who smokes to switch
3 from one brand to another.

4 Q. Well, there's been some talk about Marlboro ads
5 and I think Mr. Kaiser, one of the plaintiffs, he's got a
6 Marlboro sign. He doesn't have a sign with a wrangler or a
7 cowboy smoking, but I think we've all seen that kind of ad.
8 How do adolescents react to that kind of ad with a Joe Camel
9 or a Marlboro man or a pretty person, pretty girl or a
10 handsome man smoking?

11 A. Well, research has shown that adolescents can be
12 aware of the message that's being conveyed there, but that
13 they're not naive. They sit there and they analyze it. We
14 don't just passively accept advertising, we think about it,
15 and while they may be aware that a cowboy may try to pretend
16 that it's macho or seem macho, they recognize that really,
17 in fact, they're not cowboys, they're not like that, they
18 don't -- smoking won't make them that way, and so it really
19 doesn't have an impact in terms of their overall image of
20 who a smoker is, it's more they recognize that the ad is
21 trying to say that.

22 Q. So the adolescents are a little more sophisticated
23 than some people think they are?

24 A. Yes, the evidence definitely shows that.

25 Q. Now, I think you said that this brand preference

1 or reenforcing brand usage is the major reason that tobacco
2 companies advertise; is that correct?

3 A. Yes, I would say that that's the major reason most
4 companies advertise, but certainly tobacco companies.

5 Q. And that would apply to all -- I think you may
6 have used the word "mature products"?

7 A. Okay. It certainly would, that for mature
8 products, products that have been around for a while, that
9 have gone through a gross stage and began to level off in
10 terms of the total sales in the industry, those are mature
11 products, and for all products like that, the role of
12 advertising is to try to influence market share, brand
13 preference of one brand over another brand.

14 Q. And that does not influence consumption?

15 A. That's correct.

16 Q. Well, would cola drinks, Pepsi-Cola and Coca-Cola,
17 is that a mature product?

18 A. Certainly, yes.

19 Q. Do you think an advertisement of a person drinking
20 a Coca-Cola causes persons to initiate drinking cola?

21 A. No, people know about colas from a wide range of
22 other sources. The advertising itself isn't try to promote
23 the drinking of cola; it's trying to promote the drinking of
24 Pepsi versus Coke or Coke versus Pepsi. And the ads that
25 they use are attempts to try and provide an image for their

1 brand, not for colas in general.

2 Q. Do you believe that advertisements which advertise
3 Irish Spring soap or Dial soap, do you have an opinion as to
4 whether a consumer starts to use soap because of those ads?

5 A. No, they certainly wouldn't. They'd be again
6 knowledgeable about soap. It would simply be to try to
7 influence a particular brand of soap.

8 Q. And if a consumer sees an ad for a Dodge
9 automobile, do you think that causes them to initiate
10 driving?

11 A. No.
12 Q. Well, there's been some testimony that when a
13 young person sees Joe Camel, before he was retired last
14 year, or the Marlboro man, or a beautiful woman, that there
15 is a subjective feeling by some of the witnesses here that
16 that kind of an ad contributes to a minor's decision to
17 smoke because it looks cool or it looks attractive or it
18 looks like a neat thing to do. Do you have an opinion as to
19 whether that is true?

20 A. The literature would show that adolescents
21 generally have attitudes towards products, cigarettes, that
22 come from a lot of sources, and the most popular and most
23 common ones are your peer groups, the people slightly older
24 than they are, their parents, we get information from the
25 culture, from the society that we live in, we get

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1 information from our schools, from our churches, from a
2 large number of sources, and that these are where people
3 begin to get their ideas and their beliefs about product
4 consumption more than advertising.

5 Q. Now, did the FDA have some focus groups which
6 addressed adolescents and smoking?

7 A. Yes, I believe a couple of years ago they did do
8 this.

9 Q. And what did that show with regard to these focus
10 groups with regard to adolescents and smoking?

11 A. Well, they asked a number of questions, but among
12 their conclusions were that adolescents smoked predominantly
13 because of their friends, their peers, somewhat family
14 members, and they were asked very specifically in some cases
15 about advertising and they basically said, No, we're not
16 taken in by that advertising, we understand it, or others
17 among our age would understand it and that isn't what causes
18 us to smoke.

19 Q. Did the FTC do any kind of a study that looked at
20 whether changes in the amount of money that is spent on a
21 product is influenced by advertising?

22 A. Yes. Back in 1985, I believe, the staff of the
23 Federal Trade Commission reviewed a large body of literature
24 and evidence looking at a wide range of products, and they
25 tried to determine, was there a relationship between how

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1 much money was spent in the whole industry on advertising
2 and what sales or consumption of products in that industry
3 were. And they did it for a large number of mature products
4 and then they did it separately for, I believe it was beer
5 and also for cigarettes. And their conclusion in all of
6 those cases was that there was little or no evidence that
7 there was any relationship between total amount spent on
8 advertising and consumption or sales.

9 Q. Did they reach any conclusions in that study as to
10 what the amount spent on advertising does influence?

11 A. They suggested, I believe, in that report, and I'm
12 trying to remember that report specifically, I believe they
13 do conclude that the predominant role of advertising and
14 money spend on advertising is to influence market share of
15 brands within the product category, not the overall
16 consumption of the product category.

17 Q. Did the Office of the President of the United
18 States issue an economic report in 1987 that addressed this
19 advertising issue?

20 A. Yes, they did.

21 Q. And what did they find?

22 A. Again, they concluded that there was no
23 relationship between advertising expenditures and
24 consumption or sales.
25 Q. Did it conclude that the advertising caused

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1 loyalty to a brand as distinguished from initiation of
2 smoking?
3 A. I'm not sure, I don't recall whether it was actual
4 loyalty, but it influenced market share, which would be
5 pretty much the same thing.
6 MR. KOHN: That's all I have, Your Honor.
7 THE COURT: Mr. Banks.
8 MR. YATES: Do you want me to continue or take a
9 break and continue after lunch?
10 THE COURT: You can go ahead until noon.
11 MR. YATES: Okay.

12 CROSS-EXAMINATION

13 BY MR. YATES:
14 Q. Professor Faber, do you smoke?
15 A. No, I do not.
16 Q. Do you have children?
17 A. No, I don't.
18 Q. If you had children, would you want to see them
19 smoking?
20 A. At an age in which they could make their own
21 decision, it would be up to them.
22 Q. And would that be 14?
23 A. Not having children, I, you know, couldn't tell
24 you when my child I would think would be able to do it, but
25 I would probably not say 14.

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1 Q. Sixteen?
2 A. Again, it's hypothetical and I don't really know.
3 Q. Okay. There's been some testimony, and you've sat
4 through all the testimony today, have you not?
5 A. I believe so, yes.
6 Q. There's been some testimony that the retailer that
7 was here from the convenience store said that he had people
8 that had tried to buy -- children that had tried to buy
9 cigarettes in his store and there were various methods that
10 they used, among one of those, carding those minors. You
11 heard that testimony, did you not?
12 A. I did.
13 Q. Why do you think kids want to try to get those
14 cigarettes on the sly, so to say?
15 A. Well, I think to a large degree, adolescents want
16 to be -- appear older than they are. Generally, when we
17 reach a certain age, we'd like to be younger than we are,
18 but for adolescents there's a goal to be more mature, feel
19 older. There is also sometimes pressure from peer groups;
20 many of them may have started smoking.
21 Q. Do you think that the ads that are shown in some
22 of the tobacco billboards show people as young and vibrant
23 and healthy and doing fun things?
24 A. I believe most ads show people who are young and
25 vibrant and doing fun things, that's a fairly common image,

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1 and it's true of cigarettes as well as other things.
2 Q. And is it your testimony that that does not
3 influence a young person's decision to start smoking?
4 A. That is my testimony, yes.
5 Q. Okay. Do you own stock in any tobacco company or
6 subsidiary?

7 A. Yes, I own a hundred shares of Philip Morris.
8 Q. Okay. How often do you testify in cases like
9 this?
10 A. I believe this is the second time I've actually
11 been in court and I've also done a deposition in one or two
12 other cases.
13 Q. And who pays your fees, sir?
14 A. A law firm, Shook, Hardy, Bacon.
15 Q. Do any tobacco companies pay your fees?
16 A. Not directly, no.
17 Q. Indirectly?
18 A. I assume through the law firm.
19 Q. You talked about these focus groups from the FDA
20 and the FTC a few minutes ago, or most specifically the FDA
21 just a moment ago, correct?
22 A. Yes, that's correct.
23 Q. Were any of these focus groups performed in
24 St. Louis?
25 A. They were done in four areas around the country.

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1 I don't recall.
2 Q. So you don't know if there were any that were done
3 in St. Louis?
4 A. That's correct, I don't know.
5 Q. Do you know why the tobacco company retired Joe
6 Camel?
7 A. No, I don't.
8 Q. Would it be surprising to learn that it was
9 because the ads had been found to influence children?
10 A. I can't speak to it. I don't know why they did,
11 but I would be surprised. And again, we have to talk about
12 what "influence" means. It may be that adolescents -- or,
13 excuse me, children or adolescents are aware of that. That
14 doesn't mean it would lead them to smoke. But what their
15 motivation for it was, I assume it's more public relations
16 and because it was getting bad publicity, but I don't know
17 for a fact.
18 Q. Do you recall, and I'm sure you have probably done
19 some teaching on this, do you recall when the FCC, back in
20 1971, banned tobacco advertising from radio, TV?
21 A. I don't recall it directly, but I certainly am
22 familiar with it.
23 Q. You are familiar with that?
24 A. Yes.
25 Q. Do you know why they did that?

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1 A. I don't know what their exact reasoning was at the
2 time.
3 Q. Would you be surprised to learn that it was
4 because of the influence that it was having on minor
5 children?
6 A. I would not be surprised to think that it was
7 because of the perceived fact that it might influence them.
8 Q. Now, you basically are testifying today that
9 there's no credible research or science to support the
10 proposition that banning tobacco advertising will have the
11 desired effect -- the desired effect of influencing underage
12 minors, correct?
13 A. That is correct.
14 Q. Are there any studies that say that if we don't
15 ban them, that smoking won't go up?
16 A. Don't ban them, smoking won't go up?
17 Q. With the minors?

18 A. I don't know how you would look at that, so I'm
19 not familiar with any study --
20 Q. You're not familiar with any studies. It's not
21 your testimony, though, that advertising does not influence
22 minor children, though, correct?
23 A. I'm sorry, I was still back on your last question.
24 Q. Okay. It's not your testimony that advertising
25 does not affect minor children?

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1 A. Again, it depends how we define "affect." If
2 we're saying, are they aware of it, yes, they're aware of
3 it.
4 Q. Does it cause them to want mom and dad to purchase
5 something for them?
6 A. In some cases it may lead them to want a
7 particular brand or a particular kind of toy over another
8 one, yeah.
9 Q. And you don't think that that carries over, when
10 they get a little older and see a Joe Camel ad or to see a
11 beautiful scene on a beach with people smoking in an ad?
12 A. Again, if they have become a smoker, I can't say
13 that it wouldn't influence them to want Camels rather than
14 Marlboros. It's a brand preference, it's not -- but I would
15 say that it does not influence them relative to all these
16 other factors to want to smoke versus not smoke. That's a
17 different decision.
18 Q. So you can't say that the children might say, Oh,
19 that looks attractive to me?
20 A. They may, although there's a lot of evidence that
21 would indicate that they don't see it as attractive, but
22 some may.
23 Q. What do you base your opinion here on today, what
24 studies?
25 A. Well, there's a number of studies. We can talk

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1 about polls that have been done, gallop polls, USA Today
2 polls. We've mentioned the FDA report. We can talk about
3 the Federal Trade Commission and a lot of the studies that
4 they review in terms of economic analyses. There's a study
5 done by Otto Zinser (phonetic), et al. There's studies done
6 by a large number of people.
7 Q. Would you consider tobacco ads misleading in any
8 way?
9 A. Misleading in any way? Can you be more specific?
10 Q. Well, let me back up. Can advertising be
11 misleading?
12 A. Certainly.
13 Q. And there are misleading ads out there all the
14 time, right?
15 A. I don't know. I assume there are regulatory
16 agencies that try to prevent that. There are -- you know,
17 for the most part I don't think ads are overly misleading,
18 but --
19 Q. There are some misleading ads out there, you'd
20 agree with that. Do you think any of the tobacco ads might
21 be misleading?
22 A. I can't think of any that I would say are
23 misleading.
24 Q. But you would agree that there are agencies out
25 there that try to keep a watchdog effect on that, correct?

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1 A. That's correct.
2 Q. Do you consider signs an intrusive media?

3 A. No more so than any other medium, no.
4 Q. Well, if I'm watching television, I can turn that
5 off, can I not?
6 A. That's true.
7 Q. Radio, I can turn that off?
8 A. True.
9 Q. But I can't turn those ads off, I can't turn those
10 signs off that are in the front of the stores, can I?
11 A. Well, you can't turn them off, but you don't have
12 to notice them. In fact, evidence shows that people
13 encounter huge numbers of ads every day, but they're aware
14 of very few of them.
15 Q. I'm talking about signs. When I walk into a store
16 or when I walk into that counter and I see -- I see those
17 signs, I mean, isn't the purpose of those signs to get
18 people to buy that product?
19 A. That may be one purpose of them, or to inform them
20 that that product exists in that store. But just to give
21 you an example, with signs, I asked my students yesterday to
22 try to recall all the ads they had seen that day and most of
23 them drove and they took busses and they passed billboards,
24 and I think out of a class of about 40-some people, only one
25 person could remember one billboard that they saw, so I

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1 don't know that they really do see these things.
2 Q. Well, let's get back to my original question,
3 though. Would you consider signs an intrusive media as
4 opposed to other things like radio or television that we can
5 turn off?
6 A. If you define "intrusive" by not being able to
7 control it, yes, but in terms of whether it's noticeable,
8 I'm not sure that I would.
9 Q. Wouldn't one of the reasons a person would want to
10 put a sign in his window would be to have it noticed?
11 A. Hopefully, yes. Advertising has its goal to be
12 noticed. That doesn't mean it's successful at it, though.
13 Q. Do you know of any bans or regulations regarding
14 television or radio programming as a means to protect
15 children from certain indecent, although not necessarily
16 obscene material?
17 A. Certainly the FCC has regulations.
18 Q. And that's regarding certain programming?
19 A. Yes, my understanding is --
20 Q. Do you know why the FCC promulgates those
21 regulations?
22 A. Let me just elaborate. I'm not sure programming,
23 but content within programming, so --
24 Q. Okay. Do you know why they do that?
25 A. I assume they do it because they believe they're

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1 protecting children, or all people, I'm not sure if it's
2 just children, but protecting society.
3 Q. Well, if it's a children's show that they're
4 trying to control or to tell a particular broadcast medium
5 how many hours a day that they can have, don't you think
6 that's trying to control the viewing habits of children, or
7 to protect the children, I should say?
8 A. In that case, if that's what you're referring to,
9 it probably is.
10 THE COURT: Is this a good place to interrupt?
11 MR. YATES: Okay.
12 THE COURT: We'll be in recess until 1 o'clock.
13 (THEREUPON, a luncheon recess was had from

14 noon to 1:00 p.m.)
15 THE COURT: You may proceed.
16 BY MR. YATES:
17 Q. Professor, I don't have a whole lot more for you.
18 Pardon me if I go back over a couple of things since the
19 lunch break. How many smoking or tobacco or minor studies,
20 combination thereof, have you performed?
21 A. My early part of my research did some work in
22 children, but not with smoking.
23 Q. Not with smoking or tobacco advertising?
24 A. Correct, children and advertising in general.
25 There's none that I've actually done directly looking at

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1 both children and minors. There's one that kind of
2 tangentially touches it, but not very directly.
3 Q. And you stated you're not aware of any studies of
4 a link between tobacco advertising and children?
5 A. I'm not.
6 Q. Are there studies that are not credible?
7 A. Yes.
8 Q. Which studies?
9 A. Pierce, for example.
10 Q. Why don't you think the Pierce Report is a
11 credible study?
12 A. It's a little complex so please stop me if I'm
13 being hard to follow. The Pierce Study has a problem with
14 what's referred to as internal validity. The problem is
15 that it claims to measure one thing, but in fact really
16 isn't measuring that, and he does that. And it's kind of
17 hard to follow unless you really sit there and look at it,
18 but he gives variables names, he calls things something,
19 like receptivity to advertising and promotion when in fact
20 what he's measuring really isn't what we would think of as
21 being receptive to advertising. For example, in his study,
22 he looks at whether or not people are receptive,
23 quote-unquote, to promotions and he talks about promotions.
24 First of all, he -- the reason for looking at
25 promotions, he cites an advertising textbook by Mike Gray,

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1 and says that promotions may lead people beyond advertising
2 to actual action. That's correct. But the problem is that
3 what Mike Gray is referring to there is promotions that get
4 people who are already leaning towards a particular brand to
5 act on purchasing that brand. And he talks about things,
6 promotional things like coupons, like cents-off offers, like
7 two-for-one offers; these are things that help people to act
8 when they're thinking about acting.
9 What Pierce looks at are promotional items such as
10 caps with Marlboro on it or shirts which people have and
11 he's looking at an impact three years later. That's not at
12 all what we're talking about when we talk about promotions
13 in terms of short-term behavioral effects.
14 Then, to make matters worse, in his study he finds
15 that only 5 percent of his children actually own promotional
16 items, so then he adds to that another 10 percent who say
17 that if somebody gave them a promotional item, they would
18 use it, and I have a hard time truly believing that somebody
19 who says, Yeah, if you gave me a baseball cap, I'd wear it,
20 really is that much more receptive to the message that you
21 should smoke than somebody who isn't. I own caps for a
22 number of things, for Saturn cars, for the Minnesota Twins,
23 that I've been given over the years, I'll wear them, but
24 they don't make me any more likely to root for the Twins or

25 go to a baseball game or to want to buy a car. So I think

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1 there are real problems when you call that receptivity to
2 advertising.

3 Then -- I don't know if you want me to keep going
4 on, but we have problems at the other end, too, when he
5 talks about leading people to become smokers three years
6 later. In fact, he finds that only 3.6 percent of the
7 entire sample become smokers three years later during a
8 period that is very heavily shown to be times when
9 adolescents consider and try smoking. So I think to start
10 with, that's a very small number and, in fact, it's so small
11 he then uses another measure to really talk about whether
12 they were heading towards smoking, and there were all sorts
13 of problems with that measure as well.

14 Q. So you have a problem with his measurements and
15 his conclusions, correct?

16 A. That is correct.

17 Q. Do you find that to be typical of articles that
18 appear in the Journal of American Medical Association?

19 A. I'm sorry, is what typical?

20 Q. That you have problems with many of the articles
21 that appear in that publication?

22 A. I can't say as I've read a lot of the articles
23 that appear in that publication. I do have some problems
24 with some of the articles that they published in the area of
25 smoking and adolescents.

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1 Q. And why is that?

2 A. Well, for one reason, it's based on the individual
3 studies, but I also have a big concern for any journal that
4 issues an advocacy position before it takes research. They
5 have encouraged research to show a relationship, and I think
6 that's a mistake for any independent journal to do.

7 Q. You're not saying, though, that the Journal of the
8 American Medical Association, though, is a bad journal, are
9 you?

10 A. No, I'm not saying that.

11 Q. It's a well-respected journal, in fact?

12 A. Absolutely, but I think it has a problem in this
13 particular area.

14 Q. Now, you said that you were associated with
15 several journals and publications; is that correct?

16 A. That's correct.

17 Q. Do any of those accept tobacco advertising?

18 A. Not to the best of my knowledge.

19 Q. Those are just research journals and those type of
20 things?

21 A. Their academic journals.

22 Q. Academic journals, okay. You're not from
23 St. Louis?

24 A. No, I'm not.

25 Q. How many times have you been in St. Louis in the

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1 past ten years?

2 A. As a rough approximation, I'd say probably about
3 four or five. Maybe six.

4 Q. And you're not aware of any specific problems or
5 lack of problems regarding minors and smoking in the
6 St. Louis area, are you?

7 A. That's correct, I'm not.

8 Q. Okay. Taking a look at your CV, Professor, you've
9 got a book, a publication here, The Effects of Television

10 Advertising on Children. Briefly, what was that book
11 dealing with?

12 A. It's a review of a lot of literature that existed
13 at the time. It was done as part of a National Science
14 Foundation grant to review the literature on children and
15 television advertising at that point in time.

16 Q. What kind of advertising?

17 A. Television advertising.

18 Q. No, I mean --

19 A. Oh, I'm sorry.

20 Q. I guess what I'm trying to say is, are we talking
21 about toys, clothes? What types of ads are we talking
22 about?

23 A. Well, we weren't specifically looking at that.
24 Different chapters in the book talk about different topics,
25 and some studies use certain examples, but we're talking

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1 about, overall, the general impact of advertising and
2 advertising approaches on children for television. It
3 wasn't necessarily aimed at any particular kinds of
4 problems.

5 Q. Okay. But did you find that advertising did
6 affect the children?

7 A. Well, what it -- it doesn't really look directly
8 at that. Some studies do find some. Some find that
9 children are aware of the impact of advertising. Some
10 studies look at just consumer socialization. A lot of it
11 looks at what kinds of understanding of the purpose of
12 advertising children have. So it's not really looking so
13 much at the effects.

14 Q. Do children have an understanding of the purpose
15 of advertising?

16 A. Yes.

17 Q. And what is that general understanding?

18 A. Well, it varies by age. Very young children may
19 have some odd conceptions of what advertising is for. They
20 see it as a break between the programs, but that's two-,
21 three-year-olds. Then children go into a stage where they
22 understand that advertising is there to inform them or to
23 tell them about what exists or to sell things. And then
24 ultimately they begin to get to the stage where they
25 understand the intent of others, where they understand that

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1 the advertiser is trying to make money and understand
2 that --

3 Q. At what age does that occur?

4 A. It varies, but generally when children reach about
5 the age of 8, you begin to see a transfer over towards that,
6 and it continues till about 12 or 13.

7 Q. So they can differentiate between what the
8 advertiser is trying to push off on them?

9 A. Well, let me also say, there are different studies
10 that have used different methods and have different age
11 estimates and that's why it's kind of a fuzzy thing. The
12 studies from the chapters in the book that I was a part of
13 use verbal methods, and since that time, there's been some
14 criticism of the use of verbal methods, that children may
15 not understand words and that that may be the problem, even
16 though they understand the concepts behind it. So more
17 recent studies have used picture studies, where they point
18 to pictures of things, and those studies find that children
19 are able to understand these things at an even earlier age.

20 Q. So they're more receptive to the pictures and the

21 bright lights and the pretty things?
22 A. No, they're able to -- they may not be able to say
23 the words, They want me to buy it, but they can point to a
24 picture showing a buying transaction, so --
25 Q. They see Barney or a McDonald's Happy Meal, they
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1 know that's something that they like; is that correct?
2 A. It may be.
3 Q. Or want?
4 A. Possibly if they see Barney, they may want Barney
5 over, you know, a Sesame Street doll or other toys.
6 Q. And do children at that age, at say eight or nine
7 or ten years old, do they differentiate between I want
8 Barbie over Barney or over some other Sesame Street
9 character?
10 A. Sure. I think, you know, children very early
11 begin to develop brand preferences and preferences for
12 specific items.
13 Q. But not with tobacco items?
14 A. Tobacco is a class of product rather than a brand
15 of thing, and it's not like -- the child is going to get
16 toys, they know that from a very young age, and so it's a
17 matter of which toy do they want for Christmas. Tobacco is
18 a different thing. It's whether or not you will smoke, and
19 that becomes a primary demand issue rather than a secondary
20 demand.
21 Q. So you don't think that they see any need to want
22 to identify in any way with the Marlboro man or with Joe
23 Camel or I think there was a penguin that was used in the
24 early 70's?
25 A. As I mentioned, the study by Barb Phillips, who
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1 looks at junior high school-aged children, and what she
2 finds is, she asked them, what are the themes in this and
3 they're able to identify it. Her second question is, Is
4 this relevant to your life? And adolescents say, No, this
5 has nothing to do with me. I don't smoke. I'm not
6 interested in that. I'm not like that. And so they can
7 differentiate themselves from the message and those are two
8 different things.
9 Q. Have you performed any studies that show that
10 businesses, either the tobacco companies or somebody that
11 owns a little quick mini-mart, will suffer if an ordinance
12 like this would go into effect?
13 A. I've done no such studies.
14 Q. And you believe that enactment would not reduce
15 minors smoking, correct?
16 A. That's correct.
17 Q. And why is that?
18 A. Because I believe minors smoke for other reasons.
19 That minors smoke because their friends smoke. They smoke
20 because their parents don't say that they shouldn't smoke or
21 don't say it convincingly enough or frequently enough. They
22 do it because their parents are smoking. These are the
23 reasons that they do it, not because of advertising.
24 Q. Not because they see an ad?
25 A. That's correct.
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1 Q. And it's still your contention that when they see
2 that ad for the McDonald's Happy Meal, that they'd rather
3 have that as opposed to a Hardee's Happy Meal, not just, I
4 want McDonald's?
5 A. My belief is that it's probably much more

6 dependent on their experience of previous trips to
7 McDonald's versus Hardee's versus all these other things.
8 You have to understand that advertising exists in a much
9 larger world and that it's oftentimes these other things
10 that play a much greater role in our decisions for both
11 which products to use and which brands to use than
12 advertising does.

13 Q. And once again, you're not saying -- or it's your
14 testimony that tobacco advertising plays no role?

15 A. If it is, it's an infinitesimally small role.

16 Q. Okay.

17 MR. YATES: I don't have any further questions.

18 THE COURT: Redirect?

19 MR. KOHN: Just a few questions.

20 REDIRECT EXAMINATION

21 BY MR. KOHN:

22 Q. Doctor, with regard to the book on effects of
23 television advertising or its general impact on advertising
24 to children, if a child sees a Barney toy advertised on TV,
25 do you believe that causes that child to be initiated into

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1 an interest in toys?

2 A. No, I don't.

3 Q. Now, you were asked on cross-examination about
4 studies that you have reviewed. Have you reviewed any
5 studies of the effect of a ban on cigarette advertising in
6 other countries?

7 A. Yes, I have reviewed a number of studies like
8 that.

9 Q. What do those studies show?

10 A. There are some studies that are mixed, but the
11 vast majority of them and the most -- the best controlled
12 studies have shown that during the period of the ban, that
13 there may be an initial drop in consumption of cigarettes,
14 but usually there has already been a drop in adolescent
15 smoking prior to the institution of the ban, and so it will
16 continue for maybe a year or so, and then it will stop and
17 level up, and it will go up and down, up and down, and
18 across the countries that have utilized the ban, like
19 Canada, Norway, and Finland, in each of those, adolescent
20 smoking actually now, oftentimes 20 years later, is equal to
21 or higher than it was prior to the institution of that ban.

22 MR. KOHN: That's all I have, Your Honor.

23 MR. YATES: I don't have anything else.

24 EXAMINATION

25 BY THE COURT:

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1 Q. You mentioned that while advertising by signage
2 would not likely or maybe at all cause a person to take up
3 tobacco usage, would the same be true for the sign that
4 Mr. Kohn displayed which would have no influence on people
5 stopping to smoke? Can you say -- does the same thing
6 work?

7 A. There's mixed evidence for efforts to try to
8 reduce and get people to stop smoking. Where it seems to
9 work best is not to get people to stop, but to keep people
10 who haven't started from ever starting. And there are some
11 studies that do show that anti-smoking messages can affect
12 some people's behavior if other factors are also moving in
13 those same directions, if it's being reinforced by family
14 members, by doctors, by things like that. That's when it
15 works.

16 Q. I remember my parents -- actually it was my

17 father, who was kind of eccentric, bought a television in
18 the early part of the 1950's, and we'd sit around and
19 between the message on the screen coming and going, there
20 would be -- about the only thing on would be these detective
21 shows, and I remember all of those cigarette
22 advertisements. Like Cork-Tip Fatima cigarettes, which
23 advertised a detective show, and Kent with the Micronite
24 Filter, which turned out to be a cancer-causing problem of
25 some kind, and the Lucky Strike Hit Parade. Now, I agree

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1 that those, you know, may have been choices, but, boy, did
2 those leave an impression on me.

3 A. Okay. And we remember things. I don't know if
4 you remembered, probably during the '60s, there were a
5 number of very famous Alka-Seltzer commercials.

6 Q. Right. Flip, flap --

7 A. I can't believe I ate the whole thing. That one.

8 Q. Right.

9 A. One spicy meatball.

10 Q. Right.

11 A. And for years those were the most popular
12 commercials on. People loved them. They rated them the
13 number one. Even when they weren't on, they rated them as
14 the favorite commercial of the year.

15 Q. Right.

16 A. But all during that time, sales of Alka-Seltzer
17 never changed. They were completely flat because people
18 didn't like the product; they didn't like what it did to
19 them. So people are aware of things.

20 We find the same thing with children. Children
21 are aware of Joe Camel, for example, but there's a wonderful
22 little study by Lucy Hinke where she finds that while
23 children are aware of a lot of products for adults, when she
24 asks, Is this a good product? They say, No, it's a bad
25 product. When you ask if it's a product that's good for

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1 people, they say no. If it's appropriate for you, they say
2 no. And it's like overwhelming numbers, like 97,
3 98 percent, of very young children already recognize this.
4 So there's a big difference between remembering an ad and
5 deciding to use the product.

6 THE COURT: Okay. Any other questions?

7 MR. KOHN: I have no other questions.

8 THE COURT: You may step down, sir.

9 MR. KOHN: Your Honor, that concludes our case. I
10 would like to I think reoffer, or if I've neglected to offer
11 them, to offer for the first time, I'm offering Exhibit 1,
12 which is the stipulation.

13 THE COURT: It's been received.

14 MR. KOHN: Exhibit 2 and 2-A.

15 THE COURT: Now wait a minute. 2 and 2-A is
16 received. Let me just tell you the ones that are received.

17 MR. KOHN: Okay.

18 THE COURT: 1, 2, 3, 4, 6.

19 MR. KOHN: And the A's on those?

20 THE COURT: I'll get to those. 1, 19, 2, 3, 4, 6,
21 2-A, 3-A, 4-A, 6-A, 7, 8, 14, 15, 16, 17, 17-A, and 18.

22 MR. KOHN: 18 has been admitted. Well, those are
23 our exhibits, and we rest.

24 THE COURT: All right.

25 MR. KOHN: You did mention 19?

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1 THE COURT: I did.

2 MR. KOHN: And the one 14 is admitted for the
3 limited purposes that Your Honor stated?
4 THE COURT: Correct.
5 MR. KOHN: That's it, Your Honor, that's our
6 case.
7 THE COURT: All right. The plaintiff rests.
8 MR. BANKS: Your Honor, Defendant City of
9 St. Louis would like to orally move to dissolve the
10 temporary restraining order and to dismiss plaintiff's
11 complaint for preliminary and permanent injunction, and we
12 also ask leave of Court to file our written motion as well
13 as our memorandum of law later on this afternoon.
14 THE COURT: Permission to file is granted. I'll
15 take your motion with the case.
16 MR. BANKS: Thank you, Your Honor, and Mr. Yates
17 will call our next witness.
18 THE COURT: All right. You may do so.
19 DOUGLAS LUKE, Ph.D.,
20 called as a witness on behalf of the Defendant, was sworn,
21 and testified as follows:
22 THE COURT: Whenever you're ready, counsel.
23 MR. YATES: Thank you.
24 DIRECT EXAMINATION
25 BY MR. YATES:

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1 Q. Once again, please state your name for the
2 record.
3 A. Douglas Luke.
4 Q. And what is your address?
5 A. [DELETED].
6 Q. And where are you employed?
7 A. St. Louis University, School of Public Health.
8 Q. What is your position at the School of Public
9 Health?
10 A. I'm an assistant professor of community health
11 there.
12 Q. How long have you been with the university?
13 A. Four years.
14 Q. And prior to that, were you employed anywhere?
15 A. Yes, I was a visiting assistant professor at
16 Michigan State University in the Department of Psychology.
17 Q. Okay. Let's talk about your education just a
18 little bit. You do have a Ph.D.; is that correct?
19 A. Yes.
20 Q. And what is that in?
21 A. In clinical community psychology.
22 Q. Where did you go to school for that?
23 A. The University of Illinois in Champaign.
24 Q. Where did you get your master's?
25 A. At the University of Illinois also.

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1 Q. Was that also in psychology?
2 A. Yes, it was.
3 Q. Did you have a major?
4 A. Clinical and community psychology.
5 Q. And a minor?
6 A. Quantitative methods.
7 Q. And what was your dissertation for your Ph.D.?
8 A. My dissertation was a -- it was an examination --
9 it was an evaluation of a mutual help organization called
10 Grow, Incorporated, which is based on Alcoholics Anonymous,
11 and I was involved in an evaluation project looking at how
12 people changed as a function of being a member of Grow.

13 Specifically, I used some quantitative methods, such as
14 cluster analysis, to look at patterns of change over time.
15 Q. And what was your thesis in for your master's
16 program?
17 A. My thesis in my master's program was essentially
18 looking at the variety of individual groups, types of Grow
19 groups in that same organization. I can go into more detail
20 if --
21 Q. Where did you get your bachelor's at?
22 A. Washington University.
23 Q. And that's of course here in St. Louis?
24 A. Yes.
25 Q. Other than the times you spent in Illinois at the
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1 University of Illinois, are you a lifelong resident of this
2 area?
3 A. No, I grew up in Wisconsin.
4 Q. Okay. How long have you lived in this area?
5 A. Well, four years recently and then the four years
6 I was in undergrad.
7 Q. Okay. What awards have you received, Dr. Luke?
8 A. I was Phi Beta Kappa when I was in undergrad. I
9 received an award in graduate school for the best research
10 conducted while a graduate student in the clinical
11 psychology department. I received a Beaumont Fellowship
12 Grant Award as a new faculty member at St. Louis
13 University.
14 Q. Briefly, if you could, explain what your job
15 duties are, your position responsibilities at the St. Louis
16 University School of Public Health?
17 A. I have three or four areas of responsibilities. I
18 teach courses. Most of the courses are in the biostatistics
19 program.
20 THE COURT: In what, please?
21 A. Biostatistics. That's one major part of my time.
22 Another major part is doing research in public health. Also
23 more methodologically-based research. Then I also have
24 committee work and there's service responsibilities to the
25 university, to the profession, but most of my day-to-day
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1 work is either in research or in teaching.
2 Q. And if you could give me somewhat of a split on
3 the teaching versus research.
4 A. Well, on paper it's about even. It really
5 varies. I would say right now it's like 60/40 research to
6 teaching.
7 Q. I'm going to show you what's --
8 MR. YATES: If I may approach, Your Honor?
9 THE COURT: You may.
10 BY MR. YATES:
11 Q. I'm going to show you what's been marked as
12 Defendant's Exhibit A. Is this a copy of your CV?
13 A. Yes, it is.
14 Q. And you prepared that for this particular hearing
15 today?
16 A. Yes.
17 Q. Or a few days prior to?
18 A. Sure.
19 MR. YATES: Ask that Defendant's Exhibit A be
20 admitted.
21 THE COURT: It's received.
22 BY MR. YATES:
23 Q. Now, let's talk about your research a little bit,

24 Dr. Luke. In your deposition the other day, you talked
25 about two specific pieces of research that you have done

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1 recently. The first one is the CDC study, or the study for
2 the CDC. Would you explain for the Court a little bit about
3 that study?

4 A. Yes. A number of years ago, four or five years
5 ago, the Office in Smoking and Health in CDC wanted to --

6 THE COURT: For the record, could you state what
7 these acronyms are?

8 A. Yes. CDC is the Centers for Disease Control and
9 Prevention in Atlanta. The Office in Smoking and Health
10 sometimes is called OSH. They wanted to start a new project
11 that examined qualitative data of teens who either are
12 smokers or who may be thinking about smoking. They
13 recognized that we had a lot of good epidemiological data,
14 that is, who smoked, when they started smoking, what were
15 some of the risk factors with starting to smoke, but we
16 didn't have richer data on the process by which teens start
17 to smoke, and so they proposed a series of studies that
18 would, around the United States, get small groups of junior
19 high and high school students together and have --
20 essentially do focus groups on various aspects related to
21 teen smoking. This is an ongoing project. Each year
22 there's been a slightly different focus, but I've been
23 involved as a principal investigator through St. Louis
24 University in the past three years of this investigation.

25 Q. And correct me if I'm wrong, but this is done all

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1 over the country?

2 A. Yes, there's been different sites. I think
3 Year 1, there were 11 different sites around the United
4 States. Year 3, 13 or 14 different sites.

5 Q. And St. Louis has been one of those sites
6 throughout?

7 A. Yes.

8 Q. Is that correct? Tell us a little bit about how
9 the study was done as far as your focus groups. What did
10 they comprise?

11 A. What we did is we -- in St. Louis we went to a
12 number of different schools and we recruited students to
13 form small focus groups. And we tried to make the groups --
14 when you do qualitative research like this, it's good to
15 have the groups be relatively homogeneous, so we were
16 particularly interested in some aspects of how gender
17 related to smoking behavior, how ethnicity related to
18 smoking behavior, and how smoking status related to opinions
19 about smoking. So in our case, we had groups that were, for
20 example, white male nonsmokers. Each of the groups were --
21 we tried to get them to be about six to eight teams large.
22 They would last a couple of hours, two to four hours. One
23 year we met with each group twice. And we would essentially
24 go through -- it's not as formal as a survey where exactly
25 the same questions are asked each time, but we have certain

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1 topics that we want to have covered. For example, one of
2 the topics was the images of smoking, and we'd have the
3 teens talk about different attitudes and perceptions they
4 had about people who smoked, about smoking itself, and so
5 on.

6 Q. Let's talk about that just a minute. First of
7 all, let's clear up a few things. How old were these, you
8 say, teens?

9 A. It varied -- well, it varied slightly from site to
10 site across the country, and also from year to year. In our
11 case in St. Louis, they were primarily 14- and
12 15-year-olds. They were generally in either ninth grade or
13 tenth -- well, two years it was ninth grade. We had a few
14 teens who were younger and a few teens who were older, but
15 they were primarily 14- and 15-year-olds.

16 Q. And did you find that a majority of these teens
17 were already smokers or how did you tailor your groups to
18 that aspect?

19 A. Well, we -- when we first approached the teens, we
20 told them generally what the study was about, and in Years 1
21 and 2, we wanted both smokers and nonsmokers and we
22 essentially said, we want people who are smokers and
23 nonsmokers. In Year 3, we exclusively looked at teens who
24 were smokers. But they filled out a very short screening
25 form and as part of that screening form, they indicated

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1 their smoking status.

2 Q. And how many teens did you say were involved in
3 the St. Louis focus groups?

4 A. Over the three years, we looked at 36 different
5 groups and each of the groups, like I said, had
6 approximately six, so -- six people. We had slightly over
7 200 teens that we talked to over the three years.

8 Q. And you tried to get a wide range of teens, I take
9 it?

10 A. Yes.

11 Q. Were some of these teens from schools within the
12 city of St. Louis?

13 A. I believe so, one of the schools, but more of the
14 schools were in the county.

15 Q. Did you find any real difference between the teens
16 in the city and the teens in the county?

17 A. We did not look specifically at that. There may
18 have been, but we --

19 Q. Based on your own observations, having
20 participated in this?

21 A. Well, we did look -- we did look at other factors
22 in particular. After Year 1, we realized we needed -- the
23 whole project, with all the other sites, we needed to have a
24 wider variety of essentially income backgrounds. We had
25 collected primarily lower and lower middle class --

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1 information from lower and lower middle class teens, so we
2 actually added schools that were further out, that were from
3 communities that had higher average family incomes. There
4 were some differences that we saw primarily as due to other
5 things, for example, coming from a poorer background or
6 going to schools that had access to more resources than
7 other schools. Some of that was related to whether these
8 teens were in the city or the county, but like I said, we
9 did not look at that specifically.

10 Q. You talked about images just a moment ago. What
11 were the teens' opinions on images? What kind of questions
12 did you ask them?

13 A. We -- with this sort of research especially -- I
14 mean, one of the strengths of qualitative research is you
15 can get people talking and providing very rich information,
16 but you want to avoid asking questions like, What's your
17 opinion about smoking? So there -- you often do different
18 sorts of exercises that get at it indirectly, and one of the
19 things we did was what we called a photo sort, where we

20 showed each focus group a collection of pictures of
21 teenagers in their bedrooms. This is actually from a
22 published book that had nothing to do with smoking
23 research. But these teens were various, you know, boys and
24 girls, white, African-American, they were in messy rooms,
25 they were overweight, I mean, a wide variety of sorts of

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1 teens, and then we just asked them which of these teens were
2 smokers and which weren't. There was no information in
3 these pictures that suggested one way or the other that they
4 were actually smokers or not. But that led to a discussion
5 of what were the characteristics that they took into account
6 when they said, Oh, yeah, she's a smoker or No way does he
7 smoke. And then we had further probed that got at, Well,
8 what are some of your opinions about these sorts of teens?

9 And we found a number of very interesting things.
10 We found, for example, that teens, regardless of smoking
11 status, tended to find smoking as a fairly unattractive
12 activity. They recognized that it was dirty, that it was
13 smelly, that it had a number of unattractive features
14 associated with it. They also had perceptions that people
15 who smoked were kids who didn't have better things to do in
16 their lives. That is, kids who were active, who were busy,
17 who were involved with sports or involved with a lot of
18 school activities were probably teens who were not smoking.
19 So there were some pretty rich images that they associated
20 either with being smokers or nonsmokers.

21 And then we looked, for example, whether boys and
22 girls had different images, whether whites and
23 African-Americans had different images, whether smokers and
24 nonsmokers had different images.

25 Q. Did you find that these different groups had

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1 different images?

2 A. To a certain extent. One of the surprising
3 findings is that the least differences were found between
4 smokers and nonsmokers. There seemed to be a fairly
5 coherent image of smoking across smoking status.

6 There were bigger differences when we looked at
7 boys and girls or African-Americans and whites. Things like
8 sports activities seemed to be more important for white
9 teens in particular, white males. African-American females
10 tended to see smoking as more threatening. They often saw
11 smoking as something that would lead to -- I mean, they
12 didn't use these words, but sort of a slippery slope where
13 they would -- they had more to lose, they felt, and smoking
14 represented something that was a little scary to them
15 because of that.

16 Q. Did they talk about advertising at all?

17 A. A little. The focus of these particular studies
18 was not on advertising, per se, but there are several
19 different places where advertising came up in the focus
20 group conversations. The two -- probably the two most
21 frequent places, one was we had the teens talk about, for
22 the smokers, the first time that they smoked, or for
23 nonsmokers, we asked them, well, the first time you remember
24 thinking seriously about whether you were going to start
25 smoking or not, and we had them tell us their stories about

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1 that. And these were very -- these stories tended to be
2 fairly complex and there were a lot of issues related to
3 starting smoking.

4 One of the things that came up across a number of

5 groups and a number of teens is the images, the media images
6 of smoking. That is, they talked about that, you know,
7 everybody -- they would say something like, Everybody thinks
8 smoking is cool. I mean, you can see it in the movies, you
9 can see it on the advertising or the billboards, and they
10 would make reference that way. They also talked about other
11 things, for example, family and friends and --

12 Q. Influencing --

13 A. Yes.

14 Q. -- the use of tobacco?

15 A. Yes.

16 Q. Is it your opinion based on this study, based on
17 your observations, that even though, I think you stated some
18 of the teens thought smoking was a bad habit or was bad,
19 that they still smoked anyhow?

20 A. There are a couple of things there. First of all,
21 I didn't list all the major themes. There are a couple of
22 image themes that at least we interpret as fairly attractive
23 to teens. They saw smoking as a rebellious activity, for
24 example. That is, teens who were seen to be rebellious in
25 other ways were also seen to be smokers. And the way teens

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1 talk about that seemed to be in a more of an -- that's an
2 attractive image rather than an unattractive image.

3 The other thing that came out is that we initially
4 were looking at these 14- and 15-year-olds and felt that we
5 were dealing with young -- young teens, and that one of the
6 things about focus groups is they tell you when you're
7 wrong. And one of the things they said is, You know, you
8 got to be talking to my little brother or, you know, the
9 kids in sixth grade; that is, you have to get people
10 younger. They said, Look, I might have thought smoking was
11 cool when I was younger, but I don't now. And they were
12 very -- especially the smokers in particular were very aware
13 that they were addicted and they quickly -- essentially they
14 recognized that even if they saw it as unattractive, it was
15 something they did that they had to do and so, you know,
16 there was that paradox that they might see that it's
17 unattractive, but there were lots of other reasons that they
18 continued to smoke.

19 Q. Did they consider themselves -- I think what
20 you're trying to say, did they consider themselves as
21 adults?

22 A. They -- they didn't say it that simply, but often
23 they would say things like, I can make decisions for
24 myself. I can -- and they would talk about authority
25 figures, whether teachers or police or -- shouldn't be able

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1 to tell me what to do. So in that sense I think they saw
2 themselves, I mean not surprisingly, I think this is
3 something that's very common with teenagers, they saw
4 themselves as mature persons who could control their own
5 lives. Now, as to how accurate that was, you know, we
6 didn't go into that.

7 Q. Did they talk about availability of tobacco?

8 A. Yes. In particular, in Year 3, the Year 3 of the
9 study was focused more on tobacco control policies and there
10 was a lot of discussion about -- in terms of what would
11 happen if the price of tobacco increased, there was a lot of
12 talk about access there. They also talked about how they
13 get cigarettes now and how it might change, for example, if
14 different policies were put into place. So in Year 3, we
15 heard a lot about access to tobacco.

16 Q. Is it your opinion that they, when it's all said
17 and done, they were very aware of the tobacco, the tobacco
18 images, the tobacco advertising?

19 A. Yes.

20 Q. And how did that play a role in their lives other
21 than just smoking?

22 A. Well, I think it plays a role -- I mean, in terms
23 of just smoking, will that -- I mean, there's a lot of
24 meaning associated with that behavior of smoking. It's
25 something that is a social activity. It's something that

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1 has a physical, I mentioned addiction, you know. There's
2 physical characteristics to smoking. There's the aspect of
3 smoking is seen as -- going back to the idea of rebellion,
4 smoking I think in many teens' minds is associated with
5 things that they shouldn't do; therefore, it becomes more
6 attractive to them. I don't know if that --

7 Q. You did another study recently, did you not?

8 A. Yes.

9 Q. And is that what you call your billboard study?

10 A. Yes.

11 Q. And who was the sponsor of that study?

12 A. Well, this was a pilot study that essentially was
13 sponsored by St. Louis University.

14 Q. And what did that study concern itself with?

15 A. We wanted to look at billboard advertising in
16 St. Louis City and County with a special emphasis on tobacco
17 billboards.

18 Q. And why tobacco billboards?

19 A. Well, a couple of reasons. This has become one of
20 my areas of research, so I was interested in tobacco
21 advertising. The policy reason is that the -- with the
22 different negotiations that were happening with the tobacco
23 industry, either with the States' Attorneys General or with
24 Congress, various different restrictions on advertising were
25 being considered, and I thought it would be important to

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1 have some empirical data. A lot of the arguments were being
2 made without a lot of facts and I wanted to, at least in the
3 St. Louis area, find out what was happening with tobacco
4 billboard advertising.

5 Q. How did you go about setting this study up?

6 A. Well, this was, compared to other sorts of
7 studies, a relatively straightforward study. We decided to
8 focus on the city and the county and we developed a few
9 basic measures to record information about all the
10 billboards that we could identify in that area. This
11 included what was the broad category of billboard, for
12 example, tobacco, car, local advertising, food; what
13 specific brand was being advertised, so Marlboro, Camel,
14 Chrysler. We wanted to record the location of the billboard
15 and there are a couple of other small things that we
16 measured also.

17 Q. Why did you choose just billboards and not signs
18 in front of mini-marts or gas stations or things like this?

19 A. A couple of different reasons. One was just
20 simply a pragmatic reason that we were hoping to do this in
21 a relatively quick time frame with a small amount of money
22 and it was easier to do if we limited ourselves to
23 billboards.

24 The other thing is, we were not -- at that time,
25 my understanding was that street-side advertising changed

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1 much more quickly than large billboard advertising. I'm not
2 so sure that's true anymore, but we felt it would be easier
3 to get more reliable information if we limited ourselves to
4 billboards.

5 Q. When was this study done?

6 A. It was done the end of '97, the beginning of 1998,
7 over about a three- or four-month period.

8 Q. And are you still in the process of assembling
9 some of the information from that study?

10 A. Yes. Some of the preliminary data were presented
11 earlier in the spring, but we're still analyzing most of the
12 data from that study.

13 Q. How many billboards, if you know, were in the
14 St. Louis city area?

15 A. The ones we identified, we identified 1,309
16 different billboards.

17 Q. And of all of the billboards, would you say that
18 was 50 percent, 70 percent, 90 percent of the billboards in
19 St. Louis city?

20 A. Of the overall -- it was split fairly evenly. I
21 believe it was 60/40. 60 percent -- and I'm doing this off
22 the top of my head, but I believe for all billboards, it was
23 approximately 60 percent in the city and 40 percent in the
24 county.

25 Q. Okay. So your study concerned with -- that 60

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1 percent of the billboards were in the city and 40 percent in
2 the county. I guess I didn't clarify that well enough. How
3 many of the billboards in St. Louis city do you think you
4 covered, 70 percent of them, 100 percent of them?

5 A. In our -- in the results that we've been talking
6 about, we estimate that we've covered more than 99 percent
7 of the billboards. What we did is in initially setting up
8 the study, we did not have a good source of billboard
9 information that we trusted and that was easy to use. We
10 were hoping to have a database of all the billboards, but we
11 found out that you had to use different information for the
12 city than for the county. It was very difficult. So what
13 we did is we identified major highways and streets in
14 St. Louis and then looked at -- and these were the streets
15 that we were going to go and observe the billboards. We
16 eliminated essentially residential streets and small city
17 streets. To test this, we went out and chose randomly a
18 number of these streets that we were eliminating and we
19 never found a billboard on any of those streets. I can't
20 say that we caught 100 percent of the billboards, but we
21 caught very close to 100 percent.

22 Q. And how did you record these billboards?

23 A. We sent research assistants out in teams of two or
24 three in cars with video camera and we would assign
25 different routes to them, and that was planned so that we

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1 would cover the entire county and city area. They would
2 record, as we would go by the billboards, and speak into the
3 recorder information about the billboards as they passed.
4 They would come back to the office and then, on paper forms,
5 record the information, where was the billboard located,
6 what was the category of the billboard. We checked a number
7 of these routes, we sent people back out and essentially
8 collected the data twice to check the reliability and,
9 again, this is fairly -- it's very -- fairly simple
10 information. We had very good reliability.

11 Q. You found that your statistics are that your

12 reliability was high?
13 A. Yes.
14 Q. Who else helped you doing this study?
15 A. They were master students at the School of Public
16 Health.
17 Q. Are these people that work under you?
18 A. Yes.
19 Q. They're graduate students --
20 A. Yes.
21 Q. -- that were helping you perform the research?
22 A. Yes.
23 Q. And did these people work for you for quite some
24 time?
25 A. It varied. I mean, I've had one person who has
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1 worked for me for the last three years and then other people
2 were newer.
3 Q. Did they help you draw up the study?
4 A. Most of them did. There was a group of five
5 students, and three of them worked closely with me in
6 planning the study.
7 Q. What were your goals once again in performing this
8 study besides collecting the data?
9 A. Probably three goals. One was just to get some
10 basic descriptive information about where tobacco billboards
11 were in St. Louis, you know, how many are there, where are
12 they located, simple information like that. How many
13 tobacco billboards compared to non-tobacco billboards,
14 information like that.
15 The second goal was to look at patterns of tobacco
16 billboards that suggest specific targeted advertising
17 practices; that is, were certain types of tobacco billboards
18 found in certain areas of St. Louis?
19 And the third goal was to, given -- this is
20 another thing that has been a big part of various agreements
21 between the tobacco industry in terms of restricting
22 advertising, is the proximity of billboards to places where
23 children are, in particular, schools, day-care centers,
24 parks, sports establishments and so on.
25 Q. We'll talk about that in just a minute. I do want
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1 to ask you, though, your study did try to delve into this
2 advertising as it relates to youth or to minors?
3 A. Yes, insofar as we could given that we were just
4 recording information about billboards.
5 Q. Okay. I'm going to show you what has been marked
6 as Defendant's Exhibit B. Are these some of the preliminary
7 findings -- if you would take a look at that, are these some
8 of the preliminary findings that you found in your research?
9 A. Yes.
10 Q. And which billboards had the most -- which type of
11 product had the most billboards?
12 A. When you looked at the categories, other than the
13 local category, which really was a miscellaneous category,
14 because that advertised everything from, you know, a
15 particular -- a particular restaurant to the -- I mean,
16 there are a number of categories that were local
17 advertising, but when you look at specific product
18 categories, tobacco was the largest single category. There
19 are 242 tobacco billboards identified out of the 1300.
20 Q. And is this St. Louis city and county statistics?
21 A. Yes, this is St. Louis city and county.
22 Q. And I think you said that approximately 60 percent

23 of the billboards were in the city?
24 A. Yeah, though the -- when you look at tobacco
25 billboards, the pattern was a little different.

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1 Q. Tell us about that.

2 A. The tobacco billboards, and these numbers I do
3 remember, 145 of the 242 tobacco billboards were found in
4 the city, leaving 97 tobacco billboards in the county. When
5 you look at either, just by a count, or when you look at the
6 density of the billboards, the city has a much higher
7 density of tobacco billboards relative to the county.

8 Q. And in any of your research that you have done,
9 either for the CDC or for St. Louis University, do you have
10 an opinion as to why that is?

11 A. Well, there have been a few other billboard
12 studies and they've tended to suggest that tobacco
13 billboards are found in minority or low income areas, and
14 they tend to be -- in metropolitan areas, they often are
15 inner city areas. That's based on some other studies.
16 That's not specifically based on my own research.

17 Q. And while you didn't perform studies regarding
18 signage in convenience stores and the like, based on some of
19 your preliminary research setting up this study, as well as
20 other research, would you say it's probably just as high for
21 those convenience stores as well?

22 MR. KOHN: I'm going to object to that. There's
23 no foundation for that. It's asking for him to speculate.

24 THE COURT: Sustained.

25 BY MR. YATES:

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1 Q. Have you looked at other signage other than
2 billboards in setting up this study?

3 A. We looked at it. We did not collect data
4 specifically in those areas, but we -- I had -- when we went
5 out, we had discussions about the patterns we were finding,
6 both for -- the two things we talked about quite a bit were
7 bus stop signs and then street -- retail street-side signs.

8 Q. Did you find a lot of those?

9 A. Yes.

10 Q. And by retail street-side signs, are we talking
11 about signs that are out there by the curb?

12 A. Often.

13 Q. And did a majority of those have tobacco
14 advertising on it?

15 A. Our impression was the majority were tobacco.

16 MR. KOHN: Your Honor, I'm going to object to his
17 impression and move to strike it. Impressions are not
18 admissible. There's no documentation.

19 THE COURT: Sustained.

20 BY MR. YATES:

21 Q. Dr. Luke, if I may, I'm going to show you what's
22 been marked as City's Exhibit C. Would you please review
23 that document. Would you tell the Court what this document
24 is?

25 A. It's a photocopy of an original map that does two

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1 things. It shows the location of the 242 tobacco billboards
2 in St. Louis city and county. That is placed on top of a
3 map of census data that looks at the relation- -- looks at
4 the distribution of median family income. The original is
5 easier to read than the photocopy.

6 Q. I think the Court has the original. And this is
7 where the actual billboards are located, correct?

8 A. Yes.
9 Q. That were in your study?
10 A. Yes.
11 Q. Now, you -- I think you stated that there were
12 1309 billboards in St. Louis city and county?
13 A. Uh-huh.
14 Q. Certainly I don't see 1300 stars there.
15 A. No.
16 Q. Can you explain that discrepancy?
17 A. Yeah, this map just shows tobacco billboards. The
18 actual -- the map, if we mapped all 1300, you'd find at a
19 gross or macro level similar patterns. For example, you see
20 very few billboards located along what I call the central
21 corridor; that is, the area that goes east and west along
22 Highway 40. That's -- you see that same pattern for tobacco
23 billboards and non-tobacco billboards. What this map is
24 meant to show is that tobacco billboards tend to be found in
25 lower income areas. In St. Louis, that tends to also be
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1 true for non-tobacco billboards, but there are some
2 important differences.
3 Q. And how is that relevant to our discussion here
4 today involving protecting children from these tobacco
5 images?
6 A. Well, I think there are a couple of ways that it's
7 relevant. One is, one just finding out where the tobacco
8 billboards are allows us to say something about the exposure
9 of children to billboards. Another thing that people have
10 talked about is that children who come from -- who, let's
11 say, have a poor educational background, or children who
12 come from poorer families, they often may not have the same
13 resources. They may respond differently to advertising.
14 And some people have suggested that -- that tobacco -- that
15 tobacco companies have targeted these lower income areas and
16 this puts essentially the children and teenagers of lower
17 income families at greater risk if they're exposed to
18 tobacco advertising more than, let's say, teens from
19 different backgrounds.
20 Q. And is it my impression that you agree with those
21 studies?
22 MR. KOHN: Well, I'm going to object. He's made
23 no foundation for whether he agrees or disagrees. He has no
24 documentation of that.
25 THE COURT: Sustained.

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1 BY MR. YATES:
2 Q. What do you -- what studies have you looked at
3 that show that information?
4 A. Show what --
5 Q. That show that there is a link between this
6 advertising and the lower income and then ultimately that
7 there's children -- more children in these lower income
8 areas.
9 A. Well, I did not say that.
10 Q. Please correct me, then.
11 A. There are -- there are a couple of studies that
12 look at -- there are more than a couple, but there's several
13 studies that have looked at different patterns of sort of
14 community advertising; that is, these are community-level
15 studies that look at patterns of advertising. There was one
16 that was recently done in California and looked in
17 San Francisco and found that there were, one, more
18 billboards in Latino and African-American neighborhoods

19 compared to white neighborhoods.

20 There have been other studies that have shown
21 similar patterns in terms of the inner city. There's a
22 study in Chicago that found a similar pattern in terms of
23 African-American neighborhoods.

24 The link with children is a little different.
25 It's -- you don't see the segmentation -- I mean, in -- when

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1 you do geographic information systems analysis, which is
2 what this is, you can often find neighborhoods that are
3 primarily African-American, primarily Hispanic, primarily
4 white. You tend not to find that same differentiation in
5 terms of age, so it's not that there are neighborhoods that
6 are all children; that's not the way that our population
7 works.

8 I think the argument that public health advocates
9 have made is that given that smoking starts almost entirely
10 when people are either children or teenagers, the median age
11 is around 13, 13 and a half, that we really need to look
12 specifically at any advertising that children are exposed
13 to, and so this sort of study will eventually allow us to
14 look at patterns of tobacco advertising and exposure to
15 children.

16 Q. Do you have any preliminary results from your
17 study on that?

18 A. The preliminary results, I did some quick analysis
19 that relates to the proximity issue; that is, how close
20 billboards are to places where children are, like schools
21 and day cares. This is very preliminary, but my finding is
22 that, in particular in the city, when you look at a distance
23 of 2,000 feet, which was a common distance that was used
24 early on in the national debate about these sorts of
25 restrictions, that most tobacco billboards in the city were

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1 within 2,000 feet of a school or a day-care center.

2 Q. Do you know what the percentage of here in
3 St. Louis is?

4 A. In all of St. Louis?

5 Q. In St. Louis -- yes, either in all St. Louis or
6 just in St. Louis city.

7 A. It's much higher in the city, because what ends up
8 happening is there's so many more tobacco billboards packed
9 into a much smaller geographic area that when you draw the
10 2,000-foot diameter circles, it ends up covering the
11 majority of the city. I call this preliminary because I did
12 not calculate an exact figure based on this. We just saw
13 that the map was almost entirely covered. There were some
14 gaps, for example Forest Park had a big gap, but the county
15 is different, in that the county has so much more physical
16 space that I'm sure that the number in terms of average
17 distance from billboards to schools would be much higher.

18 Q. Now, you said just a minute ago that 2,000 feet
19 had been used early on in various discussions. Do you have
20 any knowledge as to why 2,000 feet was used?

21 A. Actually, I don't know that.

22 Q. Okay. Do you think it might have been just
23 arbitrary?

24 A. Well, my feeling is when you use these diameter
25 circles, they all are essentially arbitrary distances

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1 because they don't really take into account how children or
2 teens are really exposed to outdoor advertising. You know,
3 it's not that a billboard is necessarily invisible as soon

4 as it goes outside of that circle. Also, you don't take
5 into account the nature of how teens get to schools, looking
6 at bus routes and things like that. So I think all of these
7 circles tend to be a little bit arbitrary.

8 Q. Did you find out anything in your research
9 regarding the warning labels that were on the billboards?

10 A. Yes. This is essentially -- what we found is that
11 you couldn't read them when you're in a car, for the most
12 part, that they were very -- that to be able to read the
13 warning labels that are required to be on billboards, you
14 pretty much have to stop the car and get out.

15 Q. And what did you find with regard to, and
16 specifically I'm talking about the tobacco billboards, about
17 their visual appeal, either during the day, at night, or
18 overall?

19 A. This is based on our qualitative -- we did
20 essentially a type of focus group with the research team
21 throughout the project, and one of the strong -- we asked,
22 Okay, what were the things that you discovered about
23 billboards? What were the interesting things that you saw
24 when you were out there doing the research? And one thing
25 that was -- that all the research staff felt was that the

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1 tobacco billboards used very -- I mean, they were designed
2 better, they had better graphical design, they had sort of
3 more visceral appeal. Also, at night, they were easier to
4 see. I mean, our assumption was that they're lit up better
5 so that they're easier to see when you're driving around.

6 Q. Are there any studies that you know of that show
7 that the more exposure to this type of advertising, the more
8 likely children are to begin smoking?

9 A. Well, there are -- especially the last decade,
10 investigators have really started trying to look at this
11 link, to specifically look at a causal link between tobacco
12 advertising and teen and youth tobacco use. I think there
13 are a number of -- well, there's two, I think, fairly strong
14 studies that I think are pretty successful at showing that
15 link.

16 Q. And what are those studies --

17 A. The first --

18 Q. -- if you can recall? If you can recall?

19 A. The first is a study by Evans, et al. that
20 appeared in 1995 in the Journal of NCI, National Cancer
21 Institute, and they showed that -- that there is a link
22 between susceptibility to advertising and susceptibility to
23 smoking. And, in particular, they compared the relative
24 contributions of susceptibility of advertising to also
25 exposure, either by peers, that is, did friends around these

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1 teens smoke, or family. And what they found is not only was
2 there a link, but that the link for susceptibility to
3 advertising was stronger than that for peers or for
4 families.

5 The second and I think even stronger study is --

6 THE COURT: Just a second.

7 THE WITNESS: I'm sorry. I can slow down.

8 THE COURT: I just need to catch up. (Pause.)

9 Okay. Go ahead.

10 A. The second study is a study by Pierce, et al. that
11 I think has been talked about here earlier. It's a recent
12 study, 1998, in the Journal of the American Medical
13 Association, and this is a prospective, that is, it's a
14 longitudinal study, looking at the relationship of

15 susceptibility and exposure to advertising and subsequent
16 smoking behavior.

17 Q. And is that the Pierce Report?

18 A. Yeah, Pierce.

19 Q. Pierce Study?

20 A. Uh-huh.

21 Q. I'm going to ask you about that in just a moment.
22 You were here earlier today when Dr. Faber testified, were
23 you not, that he felt that advertising had no decision --
24 impact on the decision to smoke? Would you disagree with
25 that opinion?

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1 A. Yes, I would.

2 Q. Based on?

3 A. Well, based on a number of different things.
4 These two studies that I referred to actually I think really
5 show this causal link, first of all, that there is a
6 relationship between exposure to tobacco advertising and
7 either susceptibility or actual smoking behavior.

8 There are a number of other studies that really --
9 that really underscore a finding that I think is not all
10 that surprising; that is, teens are very aware of tobacco
11 advertising. There is a study -- there are data put out by
12 the CDC that showed that 86 percent of teens who start
13 smoking smoke three brands, Marlboro, Camel, and Newport,
14 and these happen to be the three most heavily advertised
15 brands.

16 Q. Did those brands show up in your billboard study?

17 A. Yes, they did.

18 Q. And where were they?

19 A. Newport was the most frequent billboard in
20 St. Louis by far. Camel was in the top 20 and Marlboro was
21 also.

22 Q. Okay. And I'm sorry, you were saying that
23 86 percent of the kids who smoked these brands --

24 A. Well, they -- when teens start smoking, they smoke
25 the brands that are most heavily advertised. Now, that's

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1 compared to adults. Adults don't show that strong of a
2 brand preference. In particular, adults seem to be more
3 price sensitive; that is, they're more likely to choose
4 cigarettes based on price.

5 There are other studies that have shown, for
6 example, that teens and children recognize images and
7 characters in tobacco advertising more than adults do, in
8 particular Joe Camel, the Marlboro man, I believe this --
9 well, I know those two were included in that study.

10 And the other piece of information is that when
11 you track expenditures by tobacco companies on either new or
12 revamped advertising campaigns, you see sensitivity among
13 youth. That is, for example, in the early '90s when the
14 amount of money spent on the Joe Camel campaign was almost
15 doubled, you saw the market share increase by over
16 50 percent among youth, but not among adults. So this
17 indicates that teens are being exposed to this advertising
18 and they are responding to this advertising, I believe.

19 Q. Are you aware of any evidence that links the
20 tobacco companies targeting children and teenagers in their
21 advertising campaigns?

22 A. There's -- I think there are a number of pieces of
23 evidence there. I mean, one is just recently the tobacco
24 industry itself has become one of the best sources for
25 information about this. Documents that have become --

MR. KOHN: I'm going to object to that, Your Honor. He's now going to start talking about documents that were stolen I think from Brown and Williamson and then given to a Congressman and then put on an internet, documents that the tobacco industry is claiming an attorney-client privilege, documents which have not yet been authenticated or admitted in evidence, certainly in this jurisdiction, and there's no proper foundation laid. He can't testify to documents that were on the internet, that a Congressman put on the internet that the industry is claiming privilege on.

THE COURT: The question is: "Are you aware of any evidence that links the tobacco companies targeting children and teenagers in their advertising campaigns?" So that calls for a yes or no answer and then we'll see where we go from there.

THE WITNESS: Okay.

BY MR. YATES:

Q. Are you aware of the evidence, yes or no?

A. Yes.

Q. Okay. I guess my next question will be, since we've got I presume an objection, other than these documents that counsel has talked about, are you aware of any other evidence?

A. Well, there is one document that I looked at that was reported in a source other than the internet that I do

not believe was part of -- I mean -- I mean, there is one quote --

MR. KOHN: Well, I'm going to object --

A. Okay.

MR. KOHN: -- to that quote. Whether it was on the internet or not, there are a lot of litigation going on about the admissibility of these documents, I think including that one, and I say there's no -- for him to testify about what a single document shows is improper because there's no proper foundation laid. He's not testifying as to studies. He's testifying as to some document he saw somewhere. If we can see the document, then we can talk about whether it's privileged or not, but he can't testify as an expert as to some document that he's seen somewhere. That's not a proper foundation.

THE COURT: Okay. Without revealing the content of the document, the question really doesn't probe that. It says, "[O]ther than these documents that counsel has talked about, are you aware of any other evidence?" And then you started to say, "Well, there is one document that I looked at..." And now without regard to revealing what it said, if you can identify the document and its source, if you know.

A. Okay. This is actually -- it was quotes from a document that appeared in a book called Ashes to Ashes, which is a history of the tobacco industry in this country

and it's a published book.

MR. KOHN: And that's, I believe, a recently published book and that document is again a document I understand that was stolen and is not a probative document.

THE COURT: All right. I'm not sure where --

MR. YATES: Let me rephrase my question, Dr. Luke.

BY MR. YATES:

Q. Are there any other studies or analysis of evidence that tobacco companies target children and

11 teenagers in their marketing campaigns? Are there any other
12 studies that appeared, say, in the Journal of the American
13 Medical Association?

14 A. Well, there's -- since most tobacco researchers do
15 not have access to the tobacco industry -- let me answer it
16 this way. There are a series of studies that have looked at
17 essentially the characteristics of the advertising itself
18 and then have tried to assess whether these types of
19 advertisements are aimed at youth and children.

20 Q. Have you read these studies?

21 A. Yes.

22 Q. Have you studied these studies?

23 A. Yes.

24 Q. And what was their conclusion and findings?

25 A. The main conclusion is that many of the images,

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1 specific images and/or themes used in tobacco advertising
2 are those that are particularly attractive to youth. These
3 are images that link smoking to sexuality, to other drug
4 use, they use imagery, cartoon imagery, they use types --
5 modes of advertising that are used in other types of
6 advertising that are aimed at teens. The -- well, I'll stop
7 there.

8 Q. Okay. I'm going to ask you --

9 MR. YATES: If I may approach?

10 THE COURT: You may.

11 BY MR. YATES:

12 Q. You're familiar with the -- I've given the Court
13 what's been marked as Defendant's Exhibit E, it's the Pierce
14 Study. Are you familiar with that study?

15 A. Relatively familiar, yes.

16 Q. Have you had a chance to review that study prior
17 to today?

18 A. Yes.

19 Q. Where did that study appear?

20 A. The Journal of the American Medical Association.

21 Q. And tell us about that journal just a few moments,
22 if you would.

23 A. Well, it's one of the most reputable and
24 prestigious journals where medical and public health studies
25 are published. It has -- I mean, its reputation is not just

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1 in the United States, but worldwide.

2 Q. And what about Dr. Pierce?

3 A. Dr. Pierce is -- has a long background of research
4 in tobacco issues and he's -- he's got a very long track
5 record.

6 Q. What did this -- what did this report or this
7 study show, if you would?

8 A. This was a prospective study that attempted to
9 assess the relationship between susceptibility or exposure
10 to tobacco advertising and subsequent smoking behavior or
11 tobacco use behavior among teens.

12 Q. And what did it ultimately find?

13 A. It found that there was a strong relationship
14 between exposure to tobacco advertising and subsequent
15 smoking behavior. One of the primary findings was the --
16 what's called the attributable risk; that is, for those
17 persons who -- for those teens who initially were nonsmokers
18 who became experimental smokers over those three years,
19 34 percent of that behavior can be attributed to the
20 susceptibility or exposure to tobacco advertising.

21 Q. Do you agree with these findings?

22 A. As presented in the journal article, yes, I do.
23 Q. Now, you were here about an hour ago or so when
24 you heard Dr. Faber say he disagreed with these findings and
25 did not find them credible. Can you comment on that?

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1 A. Well, there are a couple of things. One is just
2 speaking -- speaking to the -- well, speaking to a couple of
3 the weaknesses that were mentioned, I believe one point he
4 made was that only 3 or 4 percent of the samples studied
5 ended up actually smoking over the three-year period.
6 That's actually not exactly true. It's 3.6 percent became
7 regular smokers. There's another 29 and a half percent who
8 became what they defined as experimental smokers. These are
9 people who had smoked in I believe -- I believe the
10 definition was in the previous month, but they've smoked
11 less than a hundred cigarettes in their life. I think that
12 was the definition. So when you look at those numbers, well
13 over 30 percent of that group ended up smoking.

14 The most important finding here, though, is that
15 those persons who had tobacco marketing products or who said
16 that they had favorite -- could recall and had favorite
17 tobacco ads, these were the teens who were exactly the most
18 likely teens to start smoking later on.

19 Q. Are you familiar with the ordinance that we are
20 here today talking about that was passed by the City of
21 St. Louis?

22 A. Yes.

23 Q. And have you reviewed that ordinance?

24 A. Yes.

25 Q. Based on your research, your reading, your

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1 knowledge, what is your opinion regarding whether the
2 enactment would reduce -- help reduce minors smoking or help
3 reduce -- help protect the minors?

4 A. I think it will help protect the minors. I
5 can't -- I can't say specifically how many minors might stop
6 smoking or not start smoking or delay smoking. It's -- I
7 don't think anybody could say that, but given the research
8 that shows that there is a link between smoking and teen
9 tobacco use, I think putting allowable restrictions on
10 tobacco advertising will be an important part of that
11 effort.

12 Q. And do you feel that the images on these tobacco
13 billboards, based on your research and your knowledge, your
14 information, the studies you've read, that they are
15 influential upon minors?

16 A. Yes.

17 Q. Pictures more so than just words?

18 A. Yes, that's true for -- my understanding of
19 advertising research is that that's true for everybody.

20 MR. YATES: I don't have any further questions of
21 this witness. By stipulation, I believe counsel on both
22 sides of the table have stipulated to the City's map and I
23 would like to offer that as City's Exhibit D, and I think we
24 have A through E, if I'm not mistaken.

25 MR. KOHN: I think I'll object to E, Your Honor.

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1 This study, there's no proper foundation laid. He can
2 testify perhaps of his opinions of it, but the study itself,
3 I can't cross-examine a study. I can ask him about what he
4 knows about it, but the study itself would have to be
5 authenticated, so I would object to E. I have no objection
6 to the others.

7 MR. YATES: Well, I'll try to lay somewhat of a
8 foundation, if I could.

9 THE COURT: All right. Let me go ahead and
10 receive the ones to which there is no objection. A has
11 already been received. B is received. C is received. D is
12 received. And you can go ahead with your foundation on E,
13 Mr. Yates.

14 BY MR. YATES:

15 Q. I'm going to show you what's been marked as City's
16 Exhibit -- Defendant's Exhibit E. Take a look at that just
17 a moment, would you, please, Doctor.

18 A. Yes.

19 Q. Please identify that document for us.

20 A. That's a printout of the Pierce, et al. article
21 that I referred to that appeared in -- in JAMA in 1998.

22 Q. Have you seen that article both in hard copy form
23 in the Journal of the American Medical Association as well
24 as off the internet?

25 A. Yes, I have.

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1 Q. And is that document that you have in front of you
2 an exact copy or duplicate of the article as it appeared in
3 the Journal of the American Medical Association?

4 A. Other than the physical appearance, the content is
5 the exact duplicate.

6 Q. And did you indeed draw that up off the internet?

7 A. Yes, I did.

8 Q. From what site?

9 A. It's from Medline, which is the data -- it's the
10 citation database for medical and public health research.
11 They have full text access to articles that are published in
12 the Journal of the American Medical Association.

13 Q. And do you and other professors and doctors that
14 take and read this journal, do you rely on the internet
15 copies as much or more than the hard copies?

16 A. It's usually faster for us to print out a copy
17 from the internet than it is to find the journal in the
18 library and photocopy it.

19 Q. And to the best of your knowledge, information,
20 and belief, that is a true and accurate copy of that
21 article?

22 A. Yes.

23 Q. That we've referred to here today, both you and
24 Dr. Faber?

25 A. Yes.

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1 MR. YATES: I have no further questions and I'd
2 offer that Defendant's Exhibit E be admitted.

3 MR. KOHN: I object, Your Honor, it's hearsay.
4 And his looking at it might help him form opinions, but the
5 study itself is rank hearsay and there's been no proper
6 foundation. The fact that he's read something in a -- off
7 the internet doesn't make a study admissible. It's
8 hearsay.

9 THE COURT: It is hearsay. I was trying to look
10 in the rules of evidence to see if there would be any
11 exception. Do you know of any?

12 MR. YATES: I don't know of any exception, Your
13 Honor, but I think common sense would dictate, I don't think
14 it would be any different than if I had -- that I don't
15 think there would be too much difference than if we'd have
16 brought the exact article up here. I mean, he's testified
17 that that is the exact. It's also, I think, a learned

18 treatise. The Journal of the American Medical Association I
19 think would fall under that exception. I think both doctors
20 today have testified that they, while not necessarily
21 agreeing on the contents, that this is a very well-read,
22 worldwide respected medical journal.

23 THE COURT: Response, Mr. Kohn?

24 MR. KOHN: Well, I guess he's down to, as I see
25 it, they're relying on 803(18), and it would seem to me

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1 that -- it says at the end of that, that statements in that
2 kind of a learned treatise are not receivable as exhibits,
3 and I would challenge whether JAMA is a learned treatise.
4 It's a journal. It's not a learned treatise. It's a
5 magazine that has a lot of articles about a lot of things.
6 So I would say it's not a learned treatise and under 18 it
7 cannot be received as an exhibit.

8 MR. YATES: I think both doctors, Your Honor, have
9 testified that they rely on this a great deal and read it
10 and base their opinions on this. In fact, they both
11 testified to that.

12 THE COURT: 803(18) specifically says, "To the
13 extent called to the attention of an expert witness," which
14 he is, "upon cross-examination or relied upon by the expert
15 witness in direct examination," which would be the
16 circumstances here, "statements contained in published
17 treatises, periodicals," which that would be, "or pamphlets
18 on a subject of history, medicine, or other science or art,
19 established a reliable authority by the testimony or
20 admission of the witness or by other expert testimony or by
21 judicial notice. If admitted, the statements may be read
22 into evidence, but may not be received as exhibits."

23 So any statements referred to by this witness from
24 that report the Court will consider, which it has. The
25 proffer of the exhibit, however, in its total composite will

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1 be rejected.

2 MR. YATES: Thank you, Your Honor. No further
3 questions at this time.

4 MR. KOHN: Thank you.

5 CROSS-EXAMINATION

6 BY MR. KOHN:

7 Q. Dr. Luke, let me go back to the beginning of your
8 testimony, if I may, if I can find it here. Now, you
9 mentioned first of all a study that you did, I don't know if
10 you'd call it a study, it was a focus group investigation;
11 is that correct, sir?

12 A. Uh-huh, yes.

13 Q. And you went to schools and formed small focus
14 groups and then you talked to the teenagers in those focus
15 groups; is that correct?

16 A. Yes.

17 Q. And I think you said that there were -- you did
18 that for three years?

19 A. Yes.

20 Q. And I think you said that there were some
21 differences between Year 1 and 2 on one hand and Year 3 on
22 the other; is that correct?

23 A. Yes.

24 Q. Now, is it correct -- let's take Year 1, for
25 example. So we got all three years, let's start with

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1 Year 1. Now, with regard to Year 1, those were 14- and
2 15-year-olds?

3 A. Yes.
4 Q. And there were six or eight in a group?
5 A. Uh-huh.
6 Q. And you were with them one or two hours?
7 A. Yep.
8 Q. And they were in ninth or tenth grade?
9 A. Yes.
10 Q. And how many focus groups did you interview in
11 that first year?
12 A. The first year we -- there were eight groups.
13 Q. And where were those groups from?
14 A. There were -- they were from, I believe, four or
15 five different schools, high schools. In Year 1 they were
16 all high schools, I believe.
17 Q. Let's just stay with Year 1. Year 1 and then
18 we'll get on to the others. Year 1 focus groups were in
19 high schools?
20 A. Yes.
21 Q. Okay. And how many high schools?
22 A. I don't have the exact numbers at hand, but there
23 were, I think, four or five high schools.
24 Q. Okay. And which high schools were they?
25 A. I remember we went to Wellston, we went to

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1 University City, I believe, Parkway West and a couple more
2 that I'm --
3 Q. Okay. Well, certainly Wellston is not in the city
4 of St. Louis, is it?
5 A. No.
6 Q. And University City, of course, is in University
7 City?
8 A. Yes.
9 Q. And Parkway West is somewhere west of here --
10 A. Yes.
11 Q. -- not in the city; is that right?
12 A. Yes.
13 Q. Well, were these other two in the city?
14 A. I'm thinking Year 1, there was one school in the
15 city.
16 Q. What school was that?
17 A. To be honest, I can't recall offhand.
18 Q. You don't know if it was North St. Louis or South
19 St. Louis or West St. Louis or East St. Louis?
20 A. I believe it was North St. Louis.
21 Q. But you don't remember the name?
22 A. No. Most of the focus groups for all three years
23 were in the county.
24 Q. Okay. And I'm not sure I have this right, but
25 we'll talk about Year 1 now, because we've established most

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1 of these focus groups were not in the city, right, all
2 three, but let's take the Year 1.
3 A. Uh-huh.
4 Q. Were those focus groups, did those consist of
5 white male nonsmokers?
6 A. There were eight groups and we had two groups --
7 they were stratified by gender, smoking status, and race,
8 and so we had four groups that were male teens, four groups
9 that were female teens, and it was crossed so that we had
10 essentially --
11 (At this time, an announcement is heard over the
12 loudspeaker.)
13 THE COURT: This is a fire drill. I've been

14 notified that we are supposed to participate, so what we're
15 going to do is -- I apologize to you, but it's something we
16 have to go through, so we're going to take a brief recess at
17 this time. I would ask that as you leave here, that you at
18 least go out towards the marshal's desk. It's up to you
19 whether you do or not. It's up to you whether you go or
20 stay, but I'll request that you go that direction and then
21 you can go wherever you want. I am required to go outside.
22 So Court is in recess temporarily.

23 (THEREUPON, a short recess was had.)

24 THE COURT: To put you back where you were,
25 Mr. Kohn, there were eight groups -- the answer was, "There

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1 were eight groups and we had two groups -- they were
2 stratified by gender, smoking status, and race, and so we
3 had four groups that were male teens, four groups that were
4 female teens, and it was crossed so that we had
5 essentially --" and the fire alarm went off.

6 MR. KOHN: Thank you, Your Honor.

7 BY MR. KOHN:

8 Q. You had eight groups, four were male and four were
9 female in this first year of the study?

10 A. Yes.

11 Q. And those four males -- four male groups were
12 white male nonsmokers?

13 A. No.

14 Q. Okay.

15 A. There was one group that was white male nonsmoker;
16 one group that was white male smoker; one group that was
17 African-American male nonsmoker; and one group that was
18 African-American male, whatever the other one is. But it
19 was crossed in a way where there was one of each type of
20 group, and the types were gender, race, and smoking status.

21 Q. Maybe that adds up to four for males and four for
22 females?

23 A. Males, and then another four for females.

24 Q. And you inquired -- you did not ask them, I take
25 it, what caused -- let's forget about the -- for just a

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1 second those who were not smokers. The smokers, you didn't
2 ask them what caused them to start smoking?

3 A. We asked them to tell their own stories about when
4 they started smoking and then we followed up with questions
5 like, What was the -- what triggered it? Who was there?
6 How did you feel about it afterwards? We were attempting to
7 get rich -- rich descriptions of smoking initiation. As
8 part of that, they talked often about what they perceived as
9 the cause of them starting to smoke.

10 Q. And did they mention that they were influenced by
11 their peers?

12 A. Yes.

13 Q. And did they mention that they were influenced by
14 their families?

15 A. Yes.

16 Q. And did they indicate that there were other
17 factors which you might describe as their psychological
18 makeup?

19 A. Yes.

20 Q. Teenagers with low self-esteem seemed to be more
21 likely to smoke than those who had high self-esteem?

22 A. Yeah. Well, that quote comes from a different
23 part of the focus group, but it was consistent. They would
24 give reasons that were related to their psychological state

25 at that time.

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1 Q. Did you do any study of them or any focus
2 conclusions of them to see whether they thought it was cool
3 to smoke?

4 A. That was a big part of the image part of the first
5 two -- first two years, was images and, as part of that, we
6 were very interested in this whole idea of smoking as a cool
7 activity.

8 Q. And didn't they say, these teenagers, even those
9 who smoked say that it was, I think you said maybe that they
10 considered it a bad habit?

11 A. Yes, they had a mixture of sort of what you can
12 consider negative images and positive images about smoking,
13 and one of the -- one of the things was that they saw it as
14 an unattractive habit.

15 Q. And some who were smoking saw it as a rebellion
16 activity?

17 A. Yes, they often -- this is what I think, in the
18 teens' eyes, one of the positive aspects of smoking, is they
19 saw smoking as rebellious, meaning they were independent, a
20 more adult-like activity.

21 Q. And people who smoked, the teenagers that smoked
22 and those who didn't smoke tended to find smoking as
23 unattractive?

24 A. Yes, that was a strong finding.

25 Q. And as a dirty habit?

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1 A. Yes.

2 Q. And as a smelly habit?

3 A. Yes.

4 Q. Now, I think you said that some of them said, You
5 really shouldn't be talking to us. You should be talking to
6 our younger brothers and sisters. Right?

7 A. Yes.

8 Q. Did you do that?

9 A. Some of the sites did.

10 Q. Did you do that?

11 A. We went and we got middle schools after the first
12 year. We added some eighth grade, eighth grade schools, but
13 they were actually -- they were only one year younger, so we
14 did not get the, you know, 11- and 12-year-olds some of the
15 other sites in the country did.

16 Q. And those were the groups that the older teenagers
17 were saying to look at, Look at these kids that are 10, 9,
18 11, 12?

19 A. Yes, they said that when you're younger, you see
20 it as more of a cool, attractive activity, that you sort of
21 buy that message, but as soon as you start smoking, you
22 realize it's not that way.

23 Q. And are you familiar, sir, you have some training
24 in psychology --

25 A. Yes, I do.

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1 Q. -- with the third person effect?

2 A. Can you refresh --

3 Q. Maybe that's my language and not the experts'.
4 I'm talking about the fact that people often will tell you
5 what they think third persons are influenced by rather than
6 what they're influenced by.

7 A. Yes, I am aware of that.

8 Q. And have you done any studies to see whether
9 they're right about these third persons or not?

10 A. I have not. I mean, I know there are studies that
11 have been done. For example -- well, I have read studies
12 that have looked at that sort of thing.

13 Q. But that's a natural phenomenon, isn't it, that
14 people will say, Well, look it, I'm not influenced by
15 advertisements, but my kid brother or sister is.

16 A. Uh-huh.

17 Q. Isn't that true?

18 A. Yes.

19 Q. And a lot of times their kid brother and sister,
20 you talk to them and they say they're not influenced
21 either.

22 A. Well, often what you find is sort of the opposite,
23 that there's the denial that they, you know, my brother --
24 my younger brother is and I'm not. In reality, they both
25 are. I mean, it can go either way. It doesn't -- it

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1 doesn't -- the denial can either be accurate or inaccurate.

2 Q. Well, have you ever followed up, and one of the
3 persons in your focus group, a real person, says, Talk to my
4 kid brother, and then you said, Well, by golly, I will. I'm
5 going to go over and talk to your kid brother, and you went
6 over and talked to the kid brother and the kid brother said,
7 No, I'm not influenced by that either. Did you do that kind
8 of study?

9 A. No.

10 Q. So you're of the school that believes it's more
11 likely that a teenager will smoke if his peers smoke; is
12 that correct?

13 A. That's been one of the risk factors that's shown
14 to be related to smoking.

15 Q. Well, you accept that, don't you?

16 A. Yes.

17 Q. And you accept the fact that it's more likely that
18 a teenager will smoke if his parents smoke?

19 A. Yes.

20 Q. On the other hand, we all know that there are
21 parents who smoke and their teenagers can't stand smoke --

22 A. Sure.

23 Q. -- and don't smoke?

24 A. Sure. That's why risk factors by themselves only
25 tell you part of the story, because there's always the

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1 question of, well, the people who smoke and don't have peers
2 that smoke or family that smokes, you know, trying to
3 understand what that mechanism is, and that's part of why we
4 did this qualitative study is to uncover that mechanism.

5 Q. Have you done, sir, any study to show whether
6 teenagers start to smoke because of advertising?

7 A. No, I have not.

8 Q. You're not an expert in advertising?

9 A. No, I'm not.

10 Q. You've had no education in advertising?

11 A. I've had some education in community health
12 classes that are about dissemination of media messages, so I
13 have had some classwork in advertising, but I don't have a
14 degree in advertising.

15 Q. You don't feel that is an area of concentration
16 for you, do you?

17 A. No.

18 Q. And you've never taught advertising?

19 A. No, I have not.

20 Q. And you don't -- you've published no articles on

21 how consumer behavior is affected by advertising?
22 A. Not yet. I'm hoping that this billboard study
23 will lead to those sorts of studies.
24 Q. And you've taught no -- and that's in the future?
25 A. Yes.

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1 Q. You're hoping that it will be, but you don't know
2 yet?
3 A. True.
4 Q. And you've published -- you've taught no courses
5 on how consumer behavior is affected by advertising?
6 A. No, I have not.
7 Q. So would it be fair to say you have no expertise
8 at all in how consumer behavior is affected by advertising?
9 A. I have some expertise in how teens appear to be
10 affected by tobacco advertising. That's part of what the
11 research I've conducted is about.
12 Q. But none of that research you've done has caused
13 you to have a study or reach a conclusion as to whether
14 teenagers initiate smoking because of advertising.
15 A. No, that's not entirely accurate. For example, in
16 the qualitative studies I've done, when we have looked at
17 the stories that the teens have told about their initiation,
18 that is, the first time they smoke, media messages about
19 smoking are one of those components, in addition to the peer
20 and family components that you asked me about.
21 Q. But I thought you said earlier in the testimony
22 here just a second ago, and also in your deposition, that
23 you've done no study to determine the cause of smoking
24 initiation.
25 A. Well, that was a different question. I've done no

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1 specific focus study on the initiation of smoking, but you
2 asked, have I done any research that gives evidence about
3 smoking initiation. I believe that was -- that's how I
4 heard the question.
5 Q. Okay. Now, I don't want to belabor it, and I
6 zeroed in on the first group, the first year, and there were
7 two and three years, I don't want to belabor it, but were
8 the second and third years pretty much the same, or was the
9 first two years the same, I think you said, and then the
10 third year you did a little change?
11 A. The basic -- the basic design was pretty much the
12 same. The -- we added more groups. We had -- we went from
13 8 to 14 groups in Years 2 and 3, and in Year 3 we only had
14 smokers in the groups. Those are probably the two biggest
15 changes. But in terms of how we got the focus groups and
16 the sorts of things that we did in the groups, there's a lot
17 of similarities from year to year.
18 Q. I'm sorry, I lost my train of thought, the third
19 year they were all smokers?
20 A. Yes.
21 Q. And the first and second year, they were divided
22 between smokers and nonsmokers?
23 A. Yes.
24 Q. Okay. Now, you testified about your billboard
25 study and I want to make sure that I understand that. You

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1 found, if I've got this right, and I know you'll help me if
2 I don't, that there were -- you looked at 1309 billboards;
3 is that right?
4 A. Yes.
5 Q. And those were located in the city and in the

6 county?
7 A. Yes.
8 Q. And how many were in the city and how many were in
9 the county?
10 A. The total -- this is the number that I don't have
11 at hand, I mean, off the top of my head, but my recollection
12 is 60 percent of all billboards were in the city and
13 40 percent in the county.
14 Q. Okay. And that's an estimate, but that's
15 approximately correct?
16 A. Yes.
17 Q. And that's your best recollection?
18 A. Yes.
19 Q. So, I'm not much of a mathematician, but
20 60 percent of 1309, I can do that pretty well, that's about
21 780?
22 A. Something like that, yeah.
23 Q. Right? So we can say 780 were in the city,
24 roughly, and 530 were in the county?
25 A. Roughly, yes.

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1 Q. Roughly. Okay. Now, with regard to cigarette
2 billboards, however, you were -- you do have the count --
3 A. Yes.
4 Q. -- for the city and the county?
5 A. Yes.
6 Q. So 242 were the total number of billboards in both
7 the city and the county of tobacco?
8 A. Correct.
9 Q. And of those, 145 were in the city and 97 were in
10 the county, right?
11 A. Yes.
12 Q. So roughly, give or take a percentage point or
13 two, 60 percent of the cigarette billboards were in the city
14 and 40 percent were in the county?
15 A. No. Actually, if you do -- there are a couple of
16 ways to look at this. One is just the absolute numbers. A
17 better way of looking at the concentration is to look at
18 what I call density, and that is the number of billboards
19 either per square kilometer or you could even do it per
20 population, how many billboards per person in the city
21 versus the county. It's -- the actual number, I believe, is
22 not all that relevant. It's the -- it's the number combined
23 with where they're at. And so what you find, for example,
24 is the density of tobacco billboards is much higher in the
25 city compared to the county.

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1 Q. Okay. And I'm going to get to that in a second.
2 A. Okay, sure.
3 Q. I understand your testimony on that.
4 A. Okay.
5 Q. But what I'm doing is sort of a mathematical
6 thing. We've got 242 billboards of cigarettes, both in the
7 city and the county, and 145 are in the city, right?
8 A. Uh-huh.
9 Q. And 97 are in the county?
10 A. Correct.
11 Q. So if I divided 242 by 387, that would be the
12 total number of billboards, tobacco billboards, 242 plus 145
13 would be --
14 A. No, no, no, no.
15 THE COURT: No.
16 A. Divide 145 by 242.

17 BY MR. KOHN:
18 Q. Well, first I wanted to divide 242, those are the
19 number in the city -- no, that's the total number. Oh,
20 right. I don't think I did that right. Oh, right. 145
21 were in the city out of a total of --
22 A. 242.
23 Q. -- 242?
24 A. Yes.
25 Q. Okay. So if I do that, 145 divided by 242, I get
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1 59.9 percent, right?
2 A. Right.
3 Q. Virtually the same amount of billboards that are
4 in -- of non-tobacco billboards -- in other words, there's
5 60 percent --
6 A. Correct.
7 Q. Now wait a minute. Wait a minute. Let me
8 finish. There are 60 percent of non-tobacco billboards in
9 the city, right? Is that right?
10 A. Well --
11 Q. Isn't that what you just told me?
12 A. This is based on my recollection of the total. I
13 have the actual numbers. In fact, I have them --
14 Q. Well, look, didn't you just tell me you didn't
15 have the actual numbers, but approximately 60 percent of all
16 the billboards --
17 A. My recollection --
18 Q. -- were in the city?
19 A. My recollection, yes. I'm not -- yes.
20 Q. Okay. Now, haven't you just testified that
21 60 percent of the tobacco billboards were in the city?
22 A. Correct.
23 Q. Okay. And 40 percent were in the county?
24 A. Correct.
25 Q. And 40 percent of the non-tobacco billboards were
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1 in the county also?
2 A. Yeah. I'm not sure about that. That's based on
3 my recollection.
4 Q. Now, did you study to see how many total number of
5 billboard locations there are in the city versus the county?
6 A. I'm not sure I understand what that means.
7 Q. Well, you don't know how many billboards there are
8 in the city and how many billboards there are in the county,
9 do you?
10 A. Well, there's a total of 1309 and I do have the --
11 you know, in my report, I do have the exact numbers that are
12 in the city and the county, I do have the breakdown, but
13 that's --
14 Q. Yeah, but those aren't the total number. You
15 looked at four major highways or locations where these
16 billboards are.
17 A. No, no, what I did is we took a map of St. Louis
18 city and county and then we identified the top -- there's
19 six -- if I remember this correctly, there's six
20 designations that the Missouri Department of Transportation
21 uses for types of roads, going -- and going from the highest
22 one is a major interstate, divided highway, and the lowest
23 one is essentially a residential street. We worked from the
24 top down and we picked the top four; that is, these are
25 essentially the highways and the major business streets in
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1 St. Louis city and county. We excluded the bottom two types

2 of streets, using the Department of Transportation
3 designation, and this is because we did not have a good
4 source of essentially where every billboard was. I was
5 concerned that we were going to miss a certain number of
6 billboards and that's why I do not state that we saw all the
7 billboards. However, what we did is we looked at those -- a
8 selection of those streets that we did not select and looked
9 for billboards and did not find any. In the scientific
10 report from this, we're estimating that we've collected --
11 we observed over 99 percent of the billboards, but that's an
12 estimate and -- but I feel pretty good about that estimate.

13 Q. Well, did you go to the billboard companies and
14 ask them how many billboards they have in the city and
15 county?

16 A. Yes, we went -- well, we went to -- we went to
17 three different places. One of them was a billboard company
18 and they didn't want to give us that information. We got
19 some information from the state, which would have been
20 useful in the county. It was very hard to use because they
21 code everything by -- it's used for things like where they
22 put high tension wires and things like that. And they don't
23 have the addresses that would have been useful for us. So
24 that's why we, at that time, when we were trying to do the
25 study, we decided it would be more effective just for us to

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1 go out and catch everything we could.

2 Q. And wouldn't it be fair to say, sir, that these
3 four major types of highways or business streets, that
4 there's more density of those highways and streets in the
5 city than there is in the county?

6 A. Density in terms of?

7 Q. Well, here's the city (indicating). You see
8 that?

9 A. Uh-huh.

10 Q. Now, the county spreads out.

11 A. Sure.

12 Q. It's sort of like, not a V, but it spreads out
13 beyond the city, doesn't it?

14 A. Yep.

15 Q. And isn't it true, sir, that these highways, you
16 take 70 and 64 and 44 and 55, if you look at them, they
17 start to converge into the city, don't they?

18 A. Yes, they get closer together. However, there's
19 much, much greater mileage of those highways in the county.
20 I mean, in terms of the actual amount of space available for
21 billboards, there's much greater space available in the
22 county.

23 Q. Exactly, but there's more density of highways in
24 the city than there is in the county.

25 A. Sure. Yes, defined the way you did, sure.

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1 Q. So wouldn't you expect to find -- you've said
2 that, well, all the billboards are around highways, right?

3 A. Many of them are.

4 Q. So you'd expect to find a more denser number of
5 billboards in the city than the county.

6 A. Sure, I mean, that's part of the finding,
7 particularly when you're looking at exposures of teens to
8 billboards, if there's a denser collection of billboards, it
9 means there are fewer places where you don't see them in the
10 city compared to the county.

11 Q. And that's why there are 60 percent of the
12 billboards in the city and only 40 percent in the county;

13 isn't that correct?
14 A. Yes.
15 Q. Okay. Now, you say you've recently been engaged
16 to do some studies about tobacco and other things. Was it
17 the Attorney General that engaged you? Have you been
18 engaged by the Attorney General of the State of Missouri?
19 A. Not to do any studies.
20 Q. To testify?
21 A. To testify, yes.
22 Q. In the Attorney General's case against the tobacco
23 companies?
24 A. Yes.
25 Q. And when was that?

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1 A. Three weeks ago, three or four weeks ago.
2 Q. Now, is there a second billboard study? I'm not
3 sure I've got this straight.
4 A. No, just the one.
5 Q. Just the one, okay. Thank you. And that's the
6 one we've just been talking about, okay. And, indeed,
7 you're not finished with that billboard study.
8 A. That's correct.
9 Q. Now, I think you testified that tobacco billboards
10 tend to be in poorer neighborhoods.
11 A. Yes.
12 Q. That's what you found.
13 A. Yes.
14 Q. And that you identified poorer neighborhoods as
15 neighborhoods with a median income of \$27,600?
16 A. No. What I did is I combined census information
17 at the -- what's called the block group level, which is
18 essentially a small neighborhood level, and with the
19 particular software that I used, you can look at where a
20 particular tobacco or non-tobacco billboard is, like what
21 block group it is, and look at the median -- what is the
22 median household income in that block group.
23 Then what you do is you essentially compare, you
24 take all the neighborhoods, all the block groups that the
25 tobacco billboards are in and compare -- and look at the

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1 median income there and compare that to non-tobacco
2 billboards. And what you find -- what I found is a
3 statistically significant difference; that is, tobacco
4 billboards tend to be in poorer neighborhoods. Now, you --
5 there's a lot of diversity there, I mean, you find
6 billboards in various different places, but there is a
7 significant relationship between tobacco billboard placement
8 and income.
9 Q. Well, you know, I probably, and I'm not trying to
10 be humble about it, I probably didn't state it right. I'm
11 reading from an affidavit that you gave in the Attorney
12 General's case, I guess it was. And it says here, "Median
13 family income in neighborhoods (i.e., census block groups)
14 with tobacco billboards was 27,600," I guess that's dollars,
15 "compared to a median income of \$32,200 of neighborhoods
16 with non-tobacco."
17 A. Yes.
18 Q. And that's the basis for which you say that
19 tobacco billboards tend to be in poorer neighborhoods?
20 A. Yes, because that difference, using traditional
21 inferential statistics, is significantly different.
22 Q. Now, did you take the -- did you use the median
23 family income in neighborhoods just in the city and compare

24 the median family income in city neighborhoods with tobacco
25 billboards compared to the median family income of

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1 neighborhoods in the city with non-tobacco billboards?

2 A. No, I didn't. It's easy to do, but I didn't do
3 that.

4 Q. Well, wouldn't you expect to find that basically,
5 based on what we know as residents of this community, that
6 the median family income in the city tends to be lower than
7 the median family income in the county?

8 A. But that doesn't necessarily -- you can't --

9 Q. Is that -- well, I mean --

10 A. Yes.

11 Q. -- you can explain it --

12 A. Yes --

13 Q. -- but isn't that true?

14 A. Yes.

15 Q. Now go ahead and explain if you want to.

16 A. But that does not prove one way or the other, if I
17 just took the city and did that analysis, that you'd find
18 the same or different. I mean, that finding that is in that
19 affidavit only applies to the combination of the city and
20 the county. You cannot make any assumption about whether
21 that holds, because there's still, within the city, a
22 diversity of family incomes, and the question would be, are
23 tobacco billboards found in the poorer parts of the city?
24 You can't assume just because that analysis wasn't done that
25 the reason for that difference that I found is the

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1 city-county difference.

2 Q. Well, almost by definition, sir, if 60 percent of
3 the billboards are in the city, 60 percent of the -- that
4 group is going to be in a poorer neighborhood than in the
5 county.

6 A. No, but that ignores the diversity both within the
7 county and within the city. There are big differences. And
8 you may find that this relationship holds in the city as
9 well as in the county that tobacco billboards compared to
10 other billboards, for example, tend to be in the poorer
11 parts of the city. You can't assume that the relationship
12 that's in that affidavit is due to purely city-county
13 differences.

14 Q. But you did no study to find out what the median
15 family income in city neighborhoods with tobacco billboards
16 was as it compared to the median income of city
17 neighborhoods for non-tobacco billboards?

18 A. No, I did not do that.

19 Q. Okay. And we're dealing here with a city
20 ordinance, right?

21 A. Yes, but -- well, yes.

22 Q. And you said the median income for the city and
23 the county was \$27,600?

24 A. The median income for block groups where there are
25 tobacco billboards is 27,000.

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1 Q. And what was the range in those groups?

2 A. It's quite large, I don't know exactly, but the
3 range of incomes across the city and the county is quite
4 large.

5 Q. No, but I mean in those census block groups that
6 you said the median income was 27,600, was the range very,
7 very broad, like there are people making much less and
8 people making much more?

9 A. Yes.
10 Q. And the same would be true for the \$32,200?
11 A. Yes.
12 Q. The range was tremendous?
13 A. Yes.
14 Q. And do you know what the median income is for
15 people across the board in the city of St. Louis?
16 A. No, I do not know that.
17 Q. Okay. Well, if it were -- do you know if it's
18 \$27,600?
19 A. I don't know that.
20 Q. Do you know what the median income is for people
21 who live in the county?
22 A. No.
23 Q. Well, you don't feel that a census block group,
24 where the median income is 27,600, that the people in that
25 neighborhood are poor, do you?

198

1 A. I don't -- no, I don't think that.
2 Q. Well, you say the tobacco billboards tend to be
3 located in poorer neighborhoods --
4 A. Relatively --
5 Q. -- those with \$27,600.
6 A. Relative --
7 Q. And I'm asking you, sir, and then you can explain,
8 I'm asking you, sir, if you think that a census block group
9 with an income of 27,600 is a poorer neighborhood?
10 A. No. And what I wrote or what I meant to write was
11 relatively poor in the sense that 27,000 compared to 32,000,
12 that those neighborhoods are relatively poorer --
13 Q. So you're saying --
14 A. -- than the neighborhoods that do not have tobacco
15 billboards.
16 Q. So you're saying if a family has a median income
17 of 32,200 and the family next door has a median income, or
18 the block next door, the next block has a median income of
19 27,600, the first block, those people are not poor and the
20 people with the -- in the neighborhood or the block with the
21 27,600, those people are poor?
22 A. Well, that -- I don't -- I didn't say that, I
23 don't mean that, and it's a misreading of that.
24 Q. Okay. Now, you say tobacco billboards were in
25 neighborhoods whose population averaged 44.5 percent

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1 African-American, correct?
2 A. Yes, I believe that's correct.
3 Q. So would it be fair to say that tobacco billboards
4 were in neighborhoods whose population averaged 55.5 percent
5 white?
6 A. Yes. Again, you're taking relative statements and
7 making them into absolute statements, which is a
8 misinterpretation. Billboards that -- block groups that
9 have tobacco billboards in them, relatively speaking, have a
10 higher percentage of African-American residents in them than
11 block groups that have non-tobacco billboards.
12 Q. And yet the neighborhoods that average
13 44.5 percent African-American averaged 55.5 percent white;
14 isn't that correct?
15 A. In St. Louis, that would be correct, yes.
16 Q. Okay. And wouldn't it be fair to say, sir, that
17 while we have a lot of African-Americans who live in the
18 county, they are concentrated in the city?
19 A. Yes.

20 Q. And do you know if 60 percent, let's say, of
21 African-Americans are concentrated in the city?
22 A. Oh, I don't know that.
23 Q. Well, wouldn't you expect to find more billboards
24 in the city -- well, you've already said you found more
25 billboards in the city than in the county, right?

200

1 A. Yes.
2 Q. So you would expect to find more billboards in
3 predominantly African-American neighborhoods than in
4 non-African-American neighborhoods, wouldn't you?
5 A. Well, that's also ignoring the north-south
6 differences. You find many tobacco billboards in South
7 St. Louis which is, relatively speaking, more white compared
8 to North St. Louis.
9 Q. But it is true, isn't it, that you would expect to
10 find more billboards in African-American communities in the
11 city because there are more African-Americans in the city;
12 isn't that correct?
13 A. Just say that again, I'm sorry.
14 Q. Wouldn't you expect to find more billboards in
15 African-American neighborhoods in the city because there are
16 more African-Americans in the city than in the county?
17 A. Well, I mean, that sounds circular to me. You're
18 saying I would expect to find more African-Americans in the
19 city because there are more African-Americans in the city.
20 Q. No, more African-American -- more tobacco signs in
21 African-American neighborhoods in the city because there are
22 more African-American neighborhoods in the city than there
23 are in the county?
24 A. Sure. And part of -- part of the I think power of
25 having this sort of data where you know where certain

201

1 billboards are and you can relate this to census information
2 is you can try to tease apart these things. There are
3 geographic distributions of income, there are geographic
4 distributions of race, but I would not suggest that because
5 the city is more African-American, that that's the reason
6 that it's poorer. It's very complicated. And the same
7 thing, just because you have 60 percent compared to
8 40 percent billboards in the city doesn't -- this doesn't
9 all automatically equate. I mean, for example, that's why
10 we look at other things, like the pattern of the images on
11 the tobacco billboards, where we find a strong pattern of
12 north-south and it's not just city-county.
13 Q. Okay. That's a good point. I want to move on to
14 images, but before we do, I want to ask you something about
15 this survey that's been introduced into evidence. I'll move
16 over here so I stay with the podium and I'm on the
17 speakerphone here, speaker system. Here's a survey that's
18 in evidence, sir, and it shows in red that 2,000-foot buffer
19 around schools, public parks, day care, and recreation
20 centers. It covers pretty much all of the city, doesn't
21 it?
22 A. (Witness nods head up and down.)
23 Q. She can't get the nod of the head.
24 A. Oh, yes. Sorry.
25 Q. And that's pretty much consistent with your --

202

1 didn't you do a study?
2 A. Yes, I --
3 Q. You found that 90 percent of the --
4 A. Very preliminary, but it is consistent with what I

5 see here.

6 Q. Preliminarily, you found actually that 90 percent
7 of the city is covered with regard to this ordinance.

8 A. Yes, that was -- that's what I found.

9 Q. Okay. Now, you see these major highways coming in
10 here, 70, 64 --

11 A. Yes.

12 Q. -- 44, and 55? And those are along interstates
13 and they've marked those in gray, right?

14 A. Yes.

15 Q. Okay. And those areas are not covered by this
16 ordinance, are they?

17 A. Correct.

18 Q. Okay. Now, tell me how many billboards you found
19 coming along Highway 70 as you come downtown?

20 A. I can't give you an exact figure, but there are a
21 number of billboards along all of those highways except for
22 64-40 past about Grand. However, there are also many
23 billboards in the neighborhoods. I mean, what we found are
24 there are tobacco billboards by the highways and there are
25 tobacco billboards that are not by the highways.

203

1 Q. I want to know, sir, if you know -- now, look it,
2 if you don't know, just say "I don't know."

3 A. Sure.

4 Q. How many billboards did your team find along
5 Highway 70 as you enter the city and come down Highway 70 on
6 the north side and come right down here to the old
7 courthouse?

8 A. We have the data, but I don't know that number for
9 you.

10 Q. And how many billboards did you find along 64 as
11 you come past Forest Park and down to the Arch here?

12 A. Well, I remember that --

13 Q. The number. The number.

14 A. I don't have that number for you.

15 Q. Okay. And the number, sir, of billboards as
16 people come in from South County along 44 and enter the city
17 of St. Louis and come along here and get down here to the
18 Arch and to the old courthouse?

19 A. Same answer.

20 Q. The number.

21 A. I don't know.

22 Q. You don't know, okay. And the number, sir, of
23 billboards that you find along Highway 55 as people come in
24 from South County and cities south of here and come in to
25 work in downtown St. Louis?

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1 A. I don't know.

2 Q. Okay. You don't know those numbers. Well, what's
3 the total number, what's the total number of billboards
4 along the Highway 70, the Highway 64, the Highway 44, and
5 the Highway 55? If you added them all up, how much would it
6 come to?

7 A. Well, if I add up all the numbers I don't know, I
8 still get a sum I don't know.

9 Q. Well, I thought maybe you'd know --

10 A. No.

11 Q. -- a total number, but you wouldn't know a
12 breakdown.

13 A. No.

14 Q. So you don't know.

15 A. No.

16 Q. So it could be a thousand of the 1309
17 billboards -- well, not the 1309 billboards, because you
18 only found 242 cigarette billboards -- 145 billboards that
19 were cigarette billboards in the city.
20 A. Uh-huh.
21 Q. All 145 could be on those interstates.
22 A. Well, they're not.
23 Q. But you can't give me a breakdown.
24 A. But I can't give you an exact number. This study
25 was done before -- I mean, this study was done independently
205
1 of the ordinance, and so the questions that we answered had
2 no relation to the needs of, for example, this particular
3 case.
4 Q. So you don't know, do you, sir, how this ordinance
5 affects billboards?
6 A. Well, other than the preliminary -- the finding
7 consistent with what you suggested in that map, that within
8 the city, a large part of the city would be affected by this
9 ordinance.
10 Q. We know that, sir, but we don't know how many
11 billboards are affected by this ordinance because they're
12 located along these interstates which are exempt under
13 federal law.
14 A. Sure. And I've already said that there are many
15 tobacco billboards that are not along the highways. I don't
16 have an exact number.
17 Q. But you don't know the number that are affected by
18 this ordinance, do you?
19 A. Not an exact number, no.
20 Q. Or an approximate number, you don't know that
21 either?
22 A. I could give you an approximate number.
23 Q. I don't want a guess now. I don't want a guess.
24 You don't know, do you?
25 A. I don't have an exact number for you.
206
1 Q. Okay. Now, let's get into this images thing.
2 Billboards -- would this be a correct statement? In fact, I
3 think I got it out of your affidavit that you submitted in
4 the case you're going to testify to across the street.
5 Billboards with images of African-Americans are concentrated
6 in North St. Louis?
7 A. Relatively speaking, yes. That was a striking
8 finding of ours.
9 Q. Does that surprise you?
10 A. It doesn't surprise me when you think in the broad
11 sense of advertising. I mean, it makes sense to identify
12 your niche market. However, tobacco companies in the past
13 have gotten in trouble when the public has learned that they
14 were targeting African-Americans. For example, when they
15 were planning to bring out a cigarette designed for the
16 African-American community, they had to back away from
17 that. So, essentially, the concentration of particular
18 types of billboards in North St. Louis is an interesting
19 finding that at least public health professionals I think
20 are interested in.
21 Q. Well, billboards with images of white Americans
22 are generally concentrated in South St. Louis, aren't they?
23 A. That's actually not true. For tobacco billboards,
24 the billboards that have white images are throughout the
25 area. The concentration appears to be in the billboards
207

1 that use African-American images, and they tend to be,
2 relatively speaking, in North St. Louis.

3 Q. Well, how many tobacco billboards with images of
4 white Americans are in South St. Louis and how many are in
5 North St. Louis?

6 A. I don't have the numbers off the top of my head.

7 Q. How many --

8 A. Well, we can look at the map and count them.

9 Q. And that will show whether they have images of
10 white Americans or not?

11 A. Yes, the one map that I think is -- actually, I
12 don't know if it's been -- the map that we presented, the
13 second map, shows tobacco billboards and they're categorized
14 by whether they have white images, African-American images,
15 or no images, text or nonhuman pictures, and so you can see
16 where they fall in the city. And the pattern, the rough
17 pattern is that white image billboards you see throughout
18 the city and county; African-American images tend,
19 relatively speaking, to be concentrated in North St. Louis.

20 Q. Did you ever pick up a copy of Ebony magazine?

21 A. Yes.

22 Q. And did you see images of black Americans in those
23 magazines?

24 A. Yes.

25 Q. And isn't that magazine popular among the

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1 African-American population?

2 A. Yes.

3 Q. Well, isn't it sound advertising practice, sir, to
4 put African-American images in ads likely to be read by
5 African-Americans and white images to be seen in ads likely
6 to be read by white Americans?

7 A. Sure. But what we've seen is communities have
8 become very sensitive to when companies advertise products
9 that seem to be harmful to those communities, advertising
10 that's targeted towards those communities.

11 Q. By the way, isn't it true also that there are
12 a lot of people who live in the county and work downtown?
13 Isn't that correct?

14 A. Yes.

15 Q. And so a lot of people who see these ads, these
16 billboards with tobacco advertisements on these four major
17 highways that you studied, among others, that the people who
18 are going to see those, they come -- they don't just come
19 from the city.

20 A. That's true. And that's why billboard advertising
21 is relatively pretty dangerous. It's broadband. Anybody
22 can see it. You don't have to buy a particular magazine to
23 see it. Anybody who happens to walk by it will see it and
24 that's part of the problem with tobacco billboard
25 advertising.

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1 Q. But have you done any studies to see if they
2 remember those ads?

3 A. Haven't done any studies that ask, Do you
4 specifically remember seeing it on a particular highway or
5 in a particular area? We have, in the focus groups, we've
6 talked about particular -- teens talk about seeing
7 particular billboards.

8 Q. Well, you heard Dr. Faber testify that he did a
9 little focus group with his class the other day. I don't
10 know if you were here or not.

11 A. I wasn't for that part.

12 Q. He did a little focus group and he asked them to
13 write down all the ads that they saw that day and they
14 couldn't remember hardly any of them. In other words, they
15 are selectively remembering ads. Would that be consistent
16 with your psychological studies?

17 A. Part of what happens is that people do not -- this
18 is my understanding of this sort of research. That people
19 do not necessarily remember the particular place that they
20 saw advertisements, but they remember themes and images much
21 more strongly. So they may not remember where they saw a
22 Camel billboard, but they were seeing the camel, for
23 example.

24 Q. Now, you identified Defendant Exhibit B. That's
25 that one, remember (indicating)?

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1 A. Yes, sir.

2 Q. Showing that there are a lot of tobacco
3 billboards, right?

4 A. Correct.

5 Q. And that's basically what you studied, was
6 billboards?

7 A. Yes.

8 Q. Yeah. And I notice the third one, however, the
9 third most popular or most frequently advertised brand,
10 which is the way you put it, which is a much better way than
11 I just did, is Dodge automobiles.

12 A. Yes.

13 Q. Now, do you feel, sir, that people driving down
14 the highway and seeing a Dodge advertisement are likely to
15 start to become drivers and purchasers of automobiles?

16 A. Well, that's not the way it works, at least --
17 again, I'm not an advertising expert, but my understanding
18 is that stating it that sort of in a black or white fashion,
19 I mean, that's, for example, why you have more than one
20 billboard, you have more than one type of ad. What you want
21 to get is exposure and you want to dominate the market. So
22 you don't depend on seeing an ad one time to get people to
23 think about, but what happened is if you did not advertise
24 Dodge at all you would start to suffer.

25 Q. And you'd suffer because people would buy other

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1 types of automobiles?

2 A. Yes. Or, possibly, if no cars were advertised at
3 all, they might start riding their bike. I mean, you know,
4 the idea that advertising just is about brand switching, I
5 think, is a very controversial one and not supported very
6 well.

7 Q. I see. So it's your testimony, although you've
8 said you're not an expert in advertising, that if Congress,
9 in its infinite wisdom, was to ban all billboard advertising
10 of automobiles, we'd soon find everybody riding bikes?

11 A. No, but I would think we might see fewer people.

12 Q. Do you have any study to substantiate --

13 A. No.

14 Q. -- that?

15 A. No, I do not. Well, you asked me about my
16 opinion.

17 Q. Do you really believe that, sir, that if we don't
18 have any billboard advertising of automobiles, there are
19 going to be more people riding on bikes and less people
20 buying automobiles?

21 A. No, what I -- what I really believe is there are
22 different levels of brands and products, so, for example,

23 what you might find is there are other things, non-tobacco
24 related, that teens may choose to do if there were not a lot
25 of tobacco advertising. It's not -- it's not as simple as,

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1 oh, I'm going to choose one particular brand.

2 One of the things that's curious is if there's --
3 if it's all about brand switching, tobacco advertising
4 compared to, let's say, automobile advertising has very few
5 ads that are brand competitive; that is, smoke this kind
6 versus that kind. You see that all the time in car
7 advertising, but smoking advertising is almost primarily
8 advertising an image which is about the behavior of
9 smoking. Smoking is attractive, smoking is cool, smoking --
10 smoke and you'll be independent. It has nothing to do with,
11 smoke Marlboros and you'll save money and get cancer less.
12 It's more about the image of smoking.

13 Q. Well, let's take this Dodge ad. You saw 37
14 billboards?

15 A. Yes.

16 Q. Now, did those ads say, "Don't drive a Cadillac,
17 drive a Dodge"?

18 A. There were many ads that used aspects of the
19 models that were comparative. For example, there were a
20 number of ads, and I don't know whether it was Dodge, but
21 there were car ads that advertised special rebates that you
22 only got for that particular brand and not with other
23 brands. I believe there were ads that tout the safety
24 features of some of these cars relative to other, you
25 know --

213

1 Q. Okay. How many --

2 A. When there's an advertisement that touts the most
3 bought car in America or the safest car in America, it's
4 implicitly comparative. You do not see those sorts of ads
5 for tobacco advertising.

6 Q. Okay. Tell me of those 37 ads you saw for Dodge
7 how many were comparative ads.

8 A. I don't have a specific number for you.

9 Q. How many offered a rebate?

10 A. There were a number of automobile billboards that
11 offered rebates.

12 Q. I'm talking about the Dodge now. I'm talking
13 about the Dodge.

14 A. I cannot recall if they were specifically Dodge
15 ads.

16 Q. Well, you didn't even see these; you sent people
17 out to look at them, didn't you?

18 A. Well, I went out for some of them.

19 Q. Well, how many Dodge ads offered rebates?

20 A. I don't remember that specifically.

21 Q. Now, isn't it a fact, sir, that if I'm driving
22 along and I happen to own my good old Dodge and I see that
23 Dodge ad, that reenforces in my mind that, you know, Dodge
24 is okay, I like Dodge, and it reenforces my attraction to
25 the Dodge ad, to the Dodge automobile?

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1 A. Well, I don't -- I mean, I don't know if that's a
2 fact. I mean --

3 Q. Because you're not an expert in advertising.

4 A. Well, and I'm not driving your Dodge.

5 Q. Well, you -- would you dispute the fact that
6 advertising of Dodges encourages people to start buying
7 Dodges as distinguished from another brand?

8 A. No. I do not dispute the fact that advertising
9 influences brand selection, but the implication that it's
10 the only thing advertising does, I do dispute. I do think
11 that advertising influences new behavior.

12 Q. Okay. So do you think that -- what's a new
13 behavior with regard to Dodge ads?

14 A. Well, a new behavior -- I mean, I'm not certain
15 how good this parallel is, but the new behavior would be,
16 somebody who has just got their driver's license and whose
17 parents say, We'll buy you a car, and then the question is,
18 are they going to buy a car, are they going to wait, are
19 they going to save the money to use for college, I mean,
20 there's all sorts of decisions that go into that, but it's
21 not just about brand selection.

22 Q. Well, here is 18 billboards for Dean's Milk. Do
23 you think that that ad will increase the -- will start --
24 initiate people into drinking milk?

25 A. Actually, that's a good example. The parallel

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1 that -- well, the example is, well, start people drinking
2 milk relative to soda drinking versus switch to Dean's Milk
3 compared to Hawthorne Farms Milk. And I would argue that if
4 it starts people to drink milk relative to other types of
5 beverages, that's a new behavior. I mean, again, it's sort
6 of the layer -- it's the layering of, it's not just brands,
7 it's sort of product categories that you want to look at
8 with advertising.

9 Q. Well, let's take these ads, lord knows we've seen
10 them in magazines all the time, these people with milk
11 mustaches.

12 A. Yes.

13 Q. Not like your very fine one there, but milk
14 mustaches. Isn't it a fact, sir, those ads have been a
15 total failure with regard to the consumption of milk?

16 A. Actually, I don't know.

17 Q. Now, American Family Insurance, 23 ads, 23
18 billboards. Do you think that causes people to start buying
19 insurance or to start buying American Family Insurance?

20 A. It might. I mean, if you do not have insurance
21 and see a lot of advertising, it might make you -- it might
22 influence you to get insurance and it might influence you to
23 get American Family Insurance.

24 Q. In other words, it's possible?

25 A. Yes.

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1 Q. Well, a lot of things are possible, but you don't
2 have any studies to substantiate that, do you?

3 A. Well, actually, the studies that I referred to
4 earlier show that there is a causal relationship between
5 exposure to tobacco advertising and tobacco behavior among
6 youth.

7 Q. Well, you're talking about the Pierce Report.

8 A. Yes.

9 Q. All right. We'll get to that in a second. Now,
10 if people see a Coke ad, Coca-Cola ad, do you think that
11 causes them to initiate drinking colas?

12 A. It might, and especially if we're talking about a
13 developmental process the way smoking is, that is, many
14 young kids do not drink soda until they're old enough, their
15 families, you know, want them to drink juice and want them
16 to drink milk, and at some point they may decide that it's
17 time for me to start drinking soda, in which case
18 advertising probably influences them at that point.

19 Q. But have you done any studies or read any studies
20 on that?

21 A. Not directly with Coke.

22 Q. Well, isn't it a fact that the studies that there
23 are show that these Coke ads and these Pepsi-Cola ads don't
24 affect consumption, they affect the percentage of the market
25 that either Coca-Cola or Pepsi-Cola has of a static market?

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1 A. Part of that is most of those studies have been
2 done in mature markets. When Coke moves into new areas and
3 starts advertising, you see an upsurge in soda consumption.

4 Q. And isn't it true that cigarettes are, by
5 advertising definition, a mature market?

6 A. Relatively speaking, but what we've got here --

7 Q. Relatively speaking, yes?

8 A. Yes.

9 Q. Okay. Now, I think you testified, either in your
10 deposition or -- I don't think it was in your affidavit.
11 No, I don't think it was in your affidavit. You ran some
12 preliminary studies on how strong each state's tobacco
13 control policies are with regard to minors smoking; isn't
14 that correct?

15 A. Yeah, that was -- that is one that was a grant
16 application that a colleague of mine and I submitted, and as
17 part that have grant application, we did some preliminary
18 quantitative analyses.

19 Q. And where did Missouri rank in its tobacco control
20 policies?

21 A. They're in the -- in the 50 states, they're in the
22 bottom third. They're not very good.

23 Q. Okay. And have there been some studies that show
24 that one of the most effective ways to affect teenage
25 smoking is to require vendors to be licensed?

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1 A. I -- actually, I don't know -- require vendors to
2 be licensed in terms -- licensed in what way?

3 Q. Well, you have to have a cigarette vendors license
4 to sell cigarettes.

5 A. And how does that prevent teen smoking?

6 Q. Well, are you familiar with the Peter Jacobson and
7 Jeffrey Wassermann-Rand Study of Tobacco Control Laws,
8 Implementation and Enforcement?

9 A. Relatively aware. I think I've got a copy of that
10 book.

11 Q. Okay. Let me read you a sentence from that book
12 and see if you agree with it. On page 17 it says,
13 "Similarly, Jason, et al., 1991, examined the enforcement
14 of laws against selling cigarettes to minors. They found
15 that aggressive enforcement and follow-up compliance checks
16 led to 96 percent compliance by cigarette vendors against
17 sales to minors and a substantial reduction, 50 percent, in
18 tobacco use among local junior high school students." Would
19 you agree with that statement?

20 A. Well, I'm not -- I'm not prepared to, you know,
21 testify about this particular book, but there have been a
22 number of recent studies that look at compliance among
23 vendors, and the interesting finding is that although some
24 vendors may follow the rules, in the local communities, the
25 studies after Lundy Jason's study actually show that it

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1 doesn't affect teen use, that teens have essentially found
2 ways to go to other retail establishments to get their
3 cigarettes.

4 Q. So if they can't get them in the city, they'll go
5 to the county?

6 A. Or -- I mean, there are a number of ways. Often,
7 even within the same retail establishment, certain
8 salespeople will let them buy, even if it's against the law,
9 whereas others won't.

10 Q. Did you do any study of that?

11 A. I have not done any compliance studies, no.

12 Q. Now, here's another statement which I think might
13 better illustrate what I'm driving at in Jacobson and
14 Wassermann. They say on page XIX, "We also believe that
15 licensing cigarette vendors at the local level is a critical
16 ingredient to an effective enforcement program for two
17 reasons: First, as we observed in several Minnesota
18 locales, license fees can be used to finance regular
19 compliance checks, thus making the enforcement effort
20 economically self-sufficient. This in turn will ensure its
21 long-term survival. Second, license suspension for varying
22 periods of time, depending on the number of prior offenses,
23 should be an integral component of the ordinance's penalty
24 structure, because even substantial fines may in some
25 instances fail to provide a substantial deterrent to illegal

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1 sales." Do you agree with that statement?

2 A. I do think that enforcing existing laws in term of
3 retail sales to minors is important. I think that what most
4 public health practitioners believe is, like any complicated
5 health behavior, you have to have a multifaceted approach;
6 that is, any one approach by itself is not going to have a
7 strong effect, that you need to combine these approaches.

8 Q. Well, do you believe that licensing cigarette
9 vendors at the local level is a critical ingredient to an
10 effective enforcement program?

11 A. I think it's an important ingredient.

12 Q. Not a critical -- not critical?

13 A. If "critical" means most important, I --

14 Q. I think it means very important. I don't think --

15 A. Well, I think it's an important ingredient, I
16 don't dispute that.

17 Q. And is one of the reasons it's important is you
18 can collect those license fees and then use that to enforce
19 the ordinance?

20 A. Well, that gets into the whole area of financing
21 these programs and, you know, sin taxes and all of that, and
22 it's very complicated, so I -- that part of it I don't have
23 a strong opinion about one way or the other.

24 Q. Okay. Yeah, that's fine, sir, if you just don't
25 know or something --

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1 A. Sure.

2 Q. -- I'm not trying to get you to say something,
3 believe me, that you don't want to say.

4 Well, talking about financing, would you be in
5 favor of an ordinance that -- or a -- yeah, an ordinance
6 that would fund billboard ads like that one, "Keep smoking
7 and cough up a lung. It's your life"? Exhibit 14. Would
8 you be in favor of the City passing an ordinance that would
9 enable them to fund some nice billboards like that?

10 A. Yes.

11 Q. Do you think that might be effective?

12 A. Well, one of the things that we noticed in our
13 billboard study is the ratio of pro-smoking billboards to
14 anti-smoking billboards is very, very large, and balancing

15 that out, having more anti-smoking billboards I think would
16 be good.

17 Q. That's the nature of a free country, isn't it? If
18 you have one view and someone else has another view, let the
19 political expression of ideas dictate the marketplace?

20 A. Well, we don't have a -- in terms of expression of
21 ideas, we do not have a totally free market. I mean, we
22 have a long history of protecting certain groups, and
23 children is chief among them.

24 Q. And of course my clients have testified that
25 they're in favor of enforcing nonsmoking among children.

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1 You've heard their testimony, have you?

2 A. I have not heard that testimony.

3 Q. Well, the -- let's see if I've got the exhibits
4 here. What I'm trying to find is, Mr. Overfelt testified
5 about seminars that the Missouri Retailers Association is
6 running to try and educate salespeople to card minors; in
7 fact, people that are 27 years old who appear that they may
8 be under 27. Are you familiar with that little wrinkle in
9 the law?

10 A. Yes.

11 Q. And here's one. I don't know if I have to hand it
12 to you, I'd be happy to you, I've got it, thank you, sir,
13 "Free training sessions today." Are you familiar with
14 those training sessions?

15 A. Not specifically, but I know of such training
16 sessions.

17 Q. And they're trying to train salespeople to know
18 what the requirements are for teenage smoking, right?

19 A. Yes.

20 Q. And they're trying to help them spot fake IDs,
21 right?

22 A. Right.

23 Q. Okay. And then Mr. Kaiser identified some of his
24 signs he has and how he cards people very rigidly, and then
25 if you want to buy, you probably weren't here today, let me

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1 show it to you, here's his -- when you go to pay for an
2 item, you walk up over there on South Grand where his
3 convenience store is, and you go up, whatever you go up to
4 buy, you run into that sign. (Indicating.) That's a good
5 thing, isn't it?

6 A. Yes, I think that's a good thing.

7 Q. So there are a lot of ways to stop teenage
8 smoking, aren't there?

9 A. Yes, there are a lot of approaches, and the best
10 way is to combine these approaches.

11 Q. And there are a lot of ways to prevent teenage
12 smoking through ordinances that regulate or prohibit conduct
13 rather than ordinances that regulate or prohibit speech.

14 A. Yes, that is -- that's one of the approaches.
15 However, there are other areas, for example, it's not
16 unprecedented to have restrictions on advertising in other
17 areas with protected groups. So the idea that communities
18 are trying to put restrictions on advertising, you know,
19 there's precedent for that.

20 (THEREUPON, an off-the-record discussion was
21 had.)

22 Q. Let's talk about this Pierce Report, I think, a
23 second. But before -- one other thing about when we get --
24 I want to get into that Pierce Report in a second, but
25 here's another one of George Kaiser's photographs.

1 A. Turn it.
2 Q. I've got it upside down?
3 A. Yeah.
4 Q. Okay. See that little Camel there (indicating)?
5 Do you think that ad starts minors to initiate smoking?
6 A. I don't think any one individual ad starts people
7 to smoke. It's a question of all the ads in the entire
8 city, in the entire community, or the number of ads that
9 teens might see in a typical day, for example.
10 Q. Do you know that the ordinance covers that little
11 sign there?
12 A. Yes, I believe it does.
13 Q. And if I live in the city of St. Louis and I want
14 to encourage people to smoke and I put a little
15 black-and-white sign in my bedroom window that's visible
16 from the outside and it says, "Go ahead and smoke if you
17 want to," that sign would be illegal under this ordinance,
18 wouldn't it?
19 A. To be honest, I don't know. I mean, my
20 understanding of the ordinance, I'm not -- I don't know
21 whether that would be legal or not, that particular
22 example.
23 Q. And if my neighbor next door decides to get into a
24 little fight with me, maybe we don't like each other, so he
25 goes up to his bedroom window and he puts a little sign and

1 it says, "Don't smoke, it's dangerous to your health," that
2 sign would be permitted under this ordinance, wouldn't it?
3 A. Again, I -- I assume it is, but I don't know for
4 sure.
5 Q. Okay. Let's talk about the Pierce Report. I
6 think then we can just stop. Now, that study, it doesn't
7 control by parents and peer influences, does it?
8 A. It doesn't need to because of the prospective
9 nature of the study. The teens form their own control
10 groups, so if there are preexisting differences among the
11 teens with parents and peers, the fact that you get a
12 prospective study allows you to differentiate -- to look at
13 the relationship of advertising exposure to subsequent
14 tobacco behavior.
15 Q. Well, he did a study of people he called receptive
16 to smoking.
17 A. Yes.
18 Q. And then he looked at those same people three
19 years later, didn't he?
20 A. Yes.
21 Q. And what did he do for those people, how did he
22 follow those people during that three-year period to see
23 whether during that three-year period they were influenced
24 by their peers and their parents with regard to smoking?
25 A. Well, he didn't -- he didn't look at that, but he

1 didn't need to for the research question that he was
2 testing.
3 Q. But if a person is receptive to smoking and he's
4 categorized them, Mr. X, and then that young person, let's
5 say, starts running around with friends who take up smoking
6 and so he starts smoking, and then at the end of three years
7 he lists that person as smoking, whereas that person might
8 have started smoking because his peers are smoking and not
9 for any other reason.
10 A. But that doesn't explain the relationship that

11 Pierce et al. found, which is that those persons that are
12 most exposed to advertising and who were most susceptible to
13 advertising, they started smoking more frequently. Now, you
14 can suppose a lot of things that go on during that time. It
15 may be, for example, that the person who is most exposed to
16 advertising then seek out smoking -- friends who are
17 smokers. However, that does not take away that
18 relationship, which is that the persons most exposed to
19 advertising are the ones most likely to start smoking.

20 Q. But he didn't study what happened to those
21 children or young people during the three-year period, did
22 he?

23 A. Well, he didn't need to for what he was interested
24 in.

25 Q. Well, what he was interested in, to be blunt about

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1 it, was to create a study that would be helpful in these
2 Attorney General cases, isn't it?

3 MR. YATES: I'm going to object to that, Your
4 Honor. I don't think counsel has any understanding as to
5 what Dr. Pierce's ultimate goal was.

6 THE COURT: I think you said counsel has an
7 understanding. Do you mean the witness?

8 MR. YATES: Well, both.

9 THE COURT: Well, I can't -- I suspect Mr. Kohn
10 knows all about that, so I'm not going to touch that with an
11 11-foot pole, but I am going to sustain the objection as to
12 the witness.

13 MR. KOHN: Thank you, Your Honor.

14 BY MR. KOHN:

15 Q. Now, you testified that he took these teenagers or
16 minor -- persons who were minors and he -- how big a group
17 did he study?

18 A. I don't remember offhand. It was a pretty -- I
19 remember it was a pretty good-sized group.

20 Q. What would that mean, 100, 200?

21 A. I can't remember.

22 Q. So we don't know how many.

23 A. I've got it right -- I could look at it right
24 here.

25 Q. Well, let's not bother to do that now. Maybe we

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1 can later. But he found that after three years, only
2 3.4 percent of those persons became smokers, didn't he?

3 A. No, he found that 3.46 percent became regular
4 smokers. There are 29 and a half percent who became smokers
5 who were essentially experimenters. So if you're talking
6 about kids who smoke, over 30 percent of his sample became
7 smokers.

8 Q. Yes. And the 3.46 or 4 percent that became
9 regular smokers were persons who smoked fewer or more -- or
10 smoked at least 100 cigarettes over a three-year period;
11 isn't that correct?

12 A. Yes, I think that was the definition used.

13 Q. And then this other group that you would like to
14 add in, this other 29 percent or whatever it is, those were
15 experimental smokers?

16 A. Well, but you stated them as smokers, and both
17 groups are smokers, so it's a misstatement to say it's
18 3.4 percent were smokers. 35 percent were smokers.

19 Q. And of those 35 percent, 30 percent were
20 experimental smokers, which he defined -- which he defined
21 as persons who smoked at least once in three years, but

22 fewer than a hundred cigarettes in three years. Isn't that
23 his definition?

24 A. Yes.

25 Q. Okay. So you're including in your 35 percent a

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1 young person who took a puff on a cigarette during the
2 three-year period, and he did, too, didn't he?

3 A. Yes.

4 Q. And we don't know, of that 29 or 30 percent, how
5 many took one puff, may or may not have inhaled, and how
6 many took more than one puff or took more than one
7 cigarette, do we? He doesn't define that in his study.

8 A. No.

9 Q. The only thing you can say is that regular smokers
10 were 3.6 percent.

11 A. Well, you can say a lot more.

12 MR. BANKS: That's all I have, Your Honor. Thank
13 you, Doctor.

14 THE COURT: Redirect?

15 MR. YATES: Just a couple of questions.

16 REDIRECT EXAMINATION

17 BY MR. YATES:

18 Q. Is it true, Doctor, that one other approach --
19 we've talked about a lot of approaches, including
20 enforcement and things like that, different signs,
21 anti-smoking signs. One approach is to limit exposure; is
22 that correct?

23 A. Exposure to advertising?

24 Q. The tobacco advertising specifically.

25 A. Yes.

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1 Q. And about the only way to do that is obviously to
2 limit the number of signs or limit where they're at relative
3 to where the minors are at.

4 A. People have talked about other things, for
5 example, using text-only ads, but the basic approach similar
6 to, for example, removing vending machines from where
7 children and teens can have access to them, is limiting the
8 exposure of teens to tobacco advertising, yes.

9 Q. In your experience and your research and the data
10 that have you have seen and the studies you have seen, what
11 happens generally to use of a product when exposure goes up?

12 A. Exposure to advertising?

13 Q. Yes.

14 A. You see this most strongly when you compare, for
15 example, products that are heavily advertised compared to
16 things that aren't advertised at all, but generally
17 speaking, those things that are advertised are -- there's a
18 relationship with behavior. I mean, for example, I think --
19 yeah, I think I did say this earlier, the strong
20 relationship between the amount of money spent on the Joe
21 Camel campaign and the rise in the use of Camel cigarettes
22 by teens was very strong.

23 Q. And there's a link there?

24 A. There's -- those studies don't show a direct
25 causal link, but there's a correlational link there.

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1 Q. Do you know how many number of kids per day start
2 smoking?

3 A. Based on data that are a couple of years old, the
4 rough estimate is about 3,000 kids start smoking per day.
5 The latest data from the CDC say that that's gone up by a
6 fair amount.

7 Q. Do you know what that amount is?
8 A. I actually don't know exactly, but it's more so --
9 currently, it's more than 3,000 kids start smoking every
10 day.
11 Q. Is smoking by underaged -- by minors, is that
12 going up or down?
13 A. It's going up.
14 Q. And based on what -- what do you base that
15 knowledge on?
16 A. There are three primary sources, three large
17 epidemiological studies. One, the Youth Risk Behavior
18 Survey, which is done by the CDC, that's a every other year
19 national survey, school-based survey. Another one is the
20 Monitoring the Future Study, which is a yearly study based
21 at the University of Michigan. And the third is the
22 National -- NHSDA -- National Household Survey on Drug
23 Abuse. All of those data, they're independent studies, and
24 they all show a dramatic rise in teen smoking throughout the
25 '90s.

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1 Q. And you're familiar with those studies?
2 A. Fairly familiar.
3 Q. You have at least reviewed them?
4 A. Yeah, there's a lot of data there, but I've
5 reviewed smoking data based on those three studies, yes.
6 MR. YATES: The City has nothing else, Your Honor.
7 THE COURT: Recross?
8 MR. KOHN: Yes, Your Honor.
9 RECROSS-EXAMINATION

10 BY MR. KOHN:

11 Q. Do you know the percentage of teenagers that smoke
12 in the city of St. Louis?
13 A. I know what it is in Missouri. I do not know what
14 it is in the city of St. Louis.
15 Q. Do you know the percentage of African-American
16 teenagers that smoke in the city of St. Louis?
17 A. No, I do not.
18 Q. Are you familiar with the report of the Surgeon
19 General in 1998, this year, entitled Tobacco Use Among
20 U.S. Racial, Ethnic, Minority Groups?
21 A. I'm generally familiar with that, yes.
22 Q. And did you study Figure 3 in that report?
23 A. I don't --
24 Q. Let me show it to you. Maybe you -- if I show it
25 to you, it might refresh your recollection, and I don't have

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1 an extra copy, so I may have to ask for it back. I'm
2 looking at that chart.
3 A. Yes, I see it.
4 Q. Now, we may have to share this.
5 A. Sure.
6 Q. Does that refresh your recollection a little bit
7 that there is a chart?
8 A. Yeah, I've seen various graphs that are similar to
9 that from different sources.
10 Q. And basically, the black line, the thick black
11 line is for African-Americans, right?
12 A. Yes.
13 Q. And it shows that in 1997, that in their sample,
14 25 percent of black teenage at least high school students
15 were smoking, and that by 1993, that was down to
16 approximately 5 percent, or less than 5 percent. That was
17 down to about 4 percent or 3 percent; isn't that correct?

18 A. That's ignoring the trends in between those
19 years. If you look at that graph, the line starts going up,
20 I think around 1991, and that graph ends in '93. The
21 biggest change has been I think from '93 to '97.

22 Q. No, I've taken advantage of you. You're right,
23 but you've got the wrong years.

24 A. Oh, okay.

25 Q. It went down to '93, and then it started going

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1 up. And in '93 it was about 3 or 4 percent, and then in
2 '96, it looks like, it was up to 6 or 7 percent. And I
3 want you to look at that because I don't want to testify, I
4 want you to agree with me that that's an accurate
5 statement.

6 A. Well, do I need to testify just to this graph or
7 my understanding of --

8 Q. Yes. I want you to testify to that graph by the
9 Surgeon General of the United States of America in 1998.

10 A. Yes, smoking rates go up starting in '93.

11 Q. And as of '96, there are only about, whatever, 6
12 or 8 percent?

13 A. Yes, that's consistent. African-Americans smoke
14 less than whites.

15 Q. But whites, the amount of smoking has gone down
16 from 1997 from around 23 percent, then it dipped a little in
17 '94 to about 10 percent, and then went up in the last two
18 or three years, as you've pointed out, to roughly
19 14 percent.

20 A. Yeah. The troubling pattern is that after years
21 of reductions in smoking rates for all groups, teen smoking
22 has risen dramatically in the last seven to ten years. And
23 the gap actually -- this graph does not illustrate it, but
24 the gap between various ethnic groups is closing; that is,
25 what we're finding is smoking is increasing among all teens,

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1 but it's increasing more rapidly for African-American
2 teens.

3 Q. And did you hear Alderman Jones King say that it
4 was her impression from her look at health statistics for
5 the city of St. Louis that teenage smoking among
6 African-Americans has pretty much stabled out?

7 A. I did not hear her say that and I don't know what
8 that's based -- what her statement is based on.

9 Q. And you don't know if it's true or not?

10 A. I do not know if it's true or not.

11 MR. KOHN: That's all I have, Doctor.

12 THE COURT: Redirect?

13 MR. YATES: No.

14 THE COURT: You may step down, sir.

15 MR. BANKS: Your Honor, that completes the City's
16 case. We would like to, at the completion of all of the
17 evidence, assuming that there's no rebuttal witnesses, we
18 would like to renew our oral motion to dismiss the temporary
19 restraining order and motion to dismiss the application for
20 preliminary and permanent injunction.

21 Also, the written motion and memorandum of law,
22 written by Ms. White (sic) of our office, we'll make sure
23 that opposing counsel is provided with a copy of that this
24 afternoon. Would you prefer her to give the Court's copy to
25 your clerk or for her to file it upstairs?

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1 THE COURT: I think she should file it upstairs
2 and if she could drop us off a courtesy copy, that would be

3 appreciated.
4 MR. BANKS: Thank you, Your Honor.
5 THE COURT: Will there be rebuttal?
6 MR. KOHN: We have no rebuttal, Your Honor. We
7 rest.
8 THE COURT: The matter is submitted. And I shall
9 grant your request. Did I hear -- was there -- somewhere I
10 heard a two-week --
11 MR. BANKS: That's what the City is asking for,
12 Your Honor.
13 THE COURT: Two weeks. And then to respond,
14 Mr. Kohn?
15 MR. KOHN: Mr. Banks, as I understand, in two
16 weeks you're going to submit, what, a trial brief and
17 proposed findings of fact and conclusions of law?
18 MR. BANKS: Not a trial brief.
19 MR. KOHN: Just findings of fact and conclusions
20 of law?
21 MR. BANKS: That's right.
22 MR. KOHN: I think, if I could suggest, why don't
23 we do the same thing in the same two-week period and then I
24 don't know if we need any rebuttal because we're just each
25 submitting our own proposed findings of fact.

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1 MR. BANKS: We agree.
2 THE COURT: Okay. It's contemporaneously two
3 weeks.
4 MR. KOHN: Yes.
5 THE COURT: Thank you very much.
6 MR. BANKS: Could we order a copy of the
7 transcript whenever it's available?
8 MR. KOHN: Yeah, and we'll share in that expense.
9 THE COURT: Okay. Thank you all so much for your
10 careful presentation of the matter. It was very helpful to
11 me. I'll withhold any rulings, of course, until receipt of
12 the briefs and the findings. The Court is in recess.
13 MR. KOHN: Thank you, Your Honor.
14 (Proceedings concluded at 4:17 p.m.)
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2 UNITED STATES OF AMERICA)
3) ss:
4 EASTERN DISTRICT OF MISSOURI)
5
6 C E R T I F I C A T E
7 I, Carleen L. Horenkamp, Certified Shorthand
8 Reporter in and for the United States District Court for the
9 Eastern District of Missouri, do hereby certify that I was
10 present at and reported in machine shorthand the proceedings
11 had the 8th day of October, 1998, in the above-mentioned
12 court; and that the foregoing transcript is a true, correct,
and complete transcript of my stenographic notes.

13 I further certify that I am not attorney for, nor
14 employed by, nor related to any of the parties or attorneys
15 in this action, nor financially interested in the action.

16 I further certify that this transcript contains
17 pgs 1 - 237 and that this reporter takes no responsibility
18 for missing or damaged pages of this transcript when same
19 transcript is copied by any party other than this reporter.

20 IN WITNESS WHEREOF, I have hereunto set my hand at
21 St. Louis, Missouri, this day of
22 , 1998.

23
24 Carleen L. Horenkamp, RPR, CRR
25 Certified Shorthand Reporter